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In the Supreme Court of the United States

OCTOBER TERM, 1957

GEORGE F. MOORE, *Petitioner*

v.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation; SHELL OIL COMPANY, a Corporation; THE TEXAS COMPANY, a Corporation; RICHFIELD OIL CORPORATION, a Corporation; GENERAL PETROLEUM CORPORATION, a Corporation; TIDE WATER ASSOCIATED OIL COMPANY, a Corporation; and UNION OIL COMPANY OF CALIFORNIA, a Corporation, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Seattle 1, Washington

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OPINIONS BELOW

The opinion of the Court of Appeals in *Standard Oil Company of California, et al. v. George F. Moore,* No. 14927, (App. Infra, p. 1-A) is reported at 251 F. 2d 188. A collateral opinion in *General Petroleum Corp. v. District Court,* No. 14319 (App., Infra, p. 61 A) denying respondents' petition for a writ of prohibition against discovery proceedings, is reported at 213 F. 2d 689.

JURISDICTION

Petitioner, a gasoline station operator in Seattle, Washington, brought this action for treble damages

under the Sherman Anti-Trust Act in the District Court for the Western District of Washington, pursuant to 28 USC § 1337 and 15 USC § 15 (62 Stat. 928 and 38 Stat. 731) for the destruction of his business. Judgment upon a jury verdict for petitioner of $280,000.00 was entered. Respondents appealed to the United States Court of Appeals for the Ninth Circuit, pursuant to 28 USC § 1291 and § 1294 (1) (62 Stat. 929, 930).

The judgment of the United States Court of Appeals for the Ninth Circuit reversing the judgment and remanding the action for a new trial was entered on November 6, 1957. A timely Petition for Rehearing was filed on December 5, 1957, and was denied on February 10, 1958, without opinion.

The jurisdiction of this court is invoked under 28 USC § 1254 (62 Stat. 928).

QUESTIONS PRESENTED FOR REVIEW

I. Does *Palmer v. Hoffman,* 318 U.S. 109 (1943) require reversal of a trial court's findings admitting into evidence in an anti-trust action documents produced from files of a defendant oil company against that company, where each document was concededly "made in keeping with systematic and routine procedures, and concerns a matter of importance to the business" on the ground that the document deals "with the pricing and marketing policies" of a co-defendant oil company or its service station customers. (Opinion, infra, p. 40 A).

II. Are business records of an oil company inadmissible against it as a matter of law under the Business Records Act (28 USC § 1732) not withstanding testimony and other proof that each writ-

ing was made and kept in the regular course of business because:

1. Such writings include reasons why a co-defendant oil company or one of its customers altered prices, changed marketing methods or took other action relating to competition; or

2. Some of the information recorded in such writing came from a service station operator or other person not then under an affirmative legal duty to supply such information to the defendant who made and kept the writing; or

3. The writings were prepared in the course of the writer's duties and thereafter stamped, transmitted, initialled and filed by others in accordance with "regular practice," as distinguished from being specifically "required" by internal company procedure; or

4. The contents of the document are casual and informal in nature.

III. Are inter-office letters and reports dealing with the pricing and marketing policies of an oil company and its competing co-defendants, customers and prospective customers prepared in the usual course of the writer's duties inadmissible in an anti-trust action as acts, declarations or admissions of the company unless it is shown that its shareholders, directors or authorized management officials have adopted the particular letter or report prepared by and offered in evidence against that company.

IV. Should this court exercise its power of supervision to reverse the decision of the court below upon the grounds that it deprived petitioner and all others similarly situated of any effective means of enforcing rights granted under the anti-trust laws?

STATUTES INVOLVED

28 USC § 1732 (62 Stat. 945):

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section, includes business profession, occupation, and calling of every kind."

THE FACTS

George Moore, a former Seattle gasoline service station owner and operator, instituted this action against the seven major oil companies operating in the Pacific Northwest for injunctive relief and treble damages resulting from their concerted refusal to deal with him because of his refusal to abide by their pricing and marketing policies. After a thirteen week trial, the jury returned a verdict for the petitioner. Injunctive relief was denied by the trial court upon the ground petitioner was no longer in business. Upon respondent's appeal, the court below held that there was sufficient evidence before the jury to sustain the verdict (Opinion, infra, p. 37 A), but that all of the documentary evidence obtained from the defendant's business records had

been erroneously admitted by the trial court as a matter of law. It found that such evidence was not only relevant and material, but essential, and reversed because without such documents "the evidence would have been insufficient." (Opinion, infra, p. 46 A).

Pre-Trial Proceedings

Prior to the trial, petitioner obtained an order under Rule 34 for the production of variously described categories of business documents from the files of the defendants.[1]

Immediately prior to the trial, petitioner filed identical requests under Rule 36 for admission that the documents it had by then obtained and listed as intended for use at the trial were made and kept in the regular course of business. Standard Oil Company admitted each request with exceptions not now material (R. 164-70) and never contended that its documents were not admissible against it throughout the trial.[2] The other respondents denied virtually every request, even that the documents were produced pursuant to the order it had sought to set aside upon the mandamus proceedings. (Union, answer 1, R. 153).[3]

[1] The record in the District Court was printed for a mandamus proceeding against the trial judge and is included as part of this record. In their petition and during argument seeking to limit the order in both the trial and appellate courts, petitioners repeatedly referred to the documents as business records, see infra p. 84A.

[2] These answers admitted, among other things, that the documents were "genuine" and from its "regular files" and that any document purportedly made by an agent "was made in the regular course of business of said company by or under the authority of said agent." Standard qualified one of its answers, stating: "Since that time [of production] many thousands of documents have been added to and taken from the hundreds of files in which said documents were maintained, and many of said files have been combined with others, reorganized, retired or destroyed by this defendant, all in the regular course of its business." (Answer XI, R. 168).

[3] This presaged the course of the trial. When asked by the trial court if a particular document came from the business files and records of Texas, its counsel refused to so state (R. 4796). Thereupon the witness on the stand agreed that "there is no question" that the document was from the "business files" or "regular files." (R. 4800).

The Trial

The trial lasted over three months,[4] a great part of which was consumed exclusively in the authentication of documents. Petitioner first offered the documents as the acts, declarations and admissions of the respondent that made them. Upon respondents' objection, petitioner was required to furnish the additional authenticating proof required by the Business Records Act. That was accomplished by questioning adverse witnesses to establish the facts that respondents had denied during discovery procedures.[5] Except for Standard Oil Company, one or more of the respondents objected to every document, whether or not it was offered against it, and often objected to documentary evidence offered by another respondent on its own behalf. (R. 4517-18; 5822-24).[6]

In the few instances when requests were made to admit only a portion of an exhibit or otherwise limit the writing, the trial court granted the request. (R. 3800; 4476). Whenever requested, the court instructed the jury that no particular document or testimony should be considered against any other respondent, except in accordance with the usual rules applicable in conspiracy cases. (R. 924; 1427; 1737; 2821). Respondents' rights to individual consideration were emphasized again in instructions given at the close of all the evidence. (Instr. 17 and 20, R. 7500, 7501).

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[4] The trial was one of the longest on record and is comparable to major antitrust litigation instituted by the Government. (Opinion, infra, p. 22 A, note 16). Jury fees alone cost the United States at least $10,000.00. See *Report of Jury Service*, Oct. 22, 1953, Administration Office of the United States Courts.

[5] Almost 2,000 pages of the printed records are devoted exclusively to such testimony (R. 2177-2451; 2467-2536; 2599-4193).

[6] One respondent even achieved the absurdity of objecting to another's objection. Thus, when Union objected to a particular sentence in Ex. 313 (R. 3969) petitioner offered to "expunge that sentence," whereupon General Petroleum's attorney said: "I object to the expunging." (R. 3970).

Petitioner and respondents introduced 1088 exhibits, most of which were from respondents' business files and most of which dealt with "competitive conditions." The trial court required proof of each document individually, including proof of the form of the writing, identifying marks, identities and duties of the maker and recipient, subject matter and regular business procedure.[6a] He considered "the test of admissibility . . . the standpoint of the defendant whose records are in question."[7] (R. 3261).

No witness for respondents ever asserted that any particular exhibit was not a usual and ordinary business document in form or subject matter. Aside from counsels' objections no one disputed the authenticating proof even when the sender or recipient of a writing was a witness. Respondents themselves offered in evidence many documents similar in form and subject matter as business records upon less authenticating proof then was required of petitioner.

At the conclusion of the trial, the trial court said (R. 4484):

> "The Court has tried to be careful with these exhibits, and the Court has knowingly in some instances required more proof than it felt at

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[6a] The trial court refused to admit the documents merely because they were concededly kept in respondents' regular files and had been produced pursuant to the order. Other courts have held that production of records under an equivalent subpoena is a proper "indicia of authenticity" under the Business Records Act. *Ulm v. Moore-McCormack Lines*, 117 F. 2d 222 (CCA 2d 1941), cert. denied 313 U.S. 567.

[7] The maker of the record often conceded the particular document was a business record. Thus, when the 294 series of documents from Tidewater's files were first offered, counsel for Tidewater said: "I will not object to any of them." (R. 2600). Counsel for The Texas Company told the trial court that its surveys of competitors' prices as shown in the 45 series of documents were "made in the ordinary course of business" (R. 2817) and objected only on the grounds of relevancy (R. 2650) Union's attorney objected to the introduction of "confidential business records," because it "will disclose to the competitors the very thing which plaintiff is accusing us of, and that is inter-knowledge of competitive practices between the companies." (R. 2201).

the time was necessary in order to make doubly sure that there would be a legal authentication.

"All of the authenticating witnesses called to identify offered exhibits were company officers or employees called as adverse witnesses, which some of them proved to be in fact.

"If, as the trial judge presiding at this trial, I should take the view that any of those authenticating witnesses did not in fact understand the factual meaning of the phrase, 'Regular course of the company's business,' I would be disregarding the reality of his understanding to the contrary.

"Nobody could have heard these witnesses testify about these documents without knowing that every one of them understood what the question meant when he was asked whether or not that was a record made or kept in the ordinary or regular course of his company's business . . ."

Decision Below

Upon appeal to the court below, respondents argued that the evidence was insufficient to support the verdict, together with many other asserted errors. The court below found that there was:

"an agreement, combination, or conspiracy to control price cutting and curb-sign advertising by refusing gasoline to dealers whose severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers.

"There is substantial evidence that Moore was in this class of dealers." (Opinion, infra, 23-A)

This finding upon the merits rested upon testimony and writings showing concurrent and uni-

form practices adopted by the respondents in: (1) discontinuing "split-pump" accounts and requiring exclusive supply contracts; (2) public posting of tank wagon prices resulting in a tendency toward uniform prices, (3) minimizing price competition by concealing price decreases as secret and unpublished rebates and discounts from tank wagon prices to selected dealers; (4) exchanges of gasoline; and (5) "clearances" required from an existing supplier before dealing with a service station operator. (Opinion, infra, p. 32-A)

The evidence, the court said, showed "consciously parallel business behavior in matters touching prices and competition" and was "admissible circumstantial evidence of an underlying agreement, combination, or conspiracy concerning such matters." (Opinion, infra, p. 34-A)

Having found there was substantial competent evidence to support the verdict, the court below then held as a matter of law that virtually all of the writings were erroneously admitted into evidence, requiring reversal for a new trial, without regard to any or all of the authenticating facts upon which the trial court relied in admitting the documents in evidence.

The court below did not refer to a single exhibit in the substantive section of its opinion and quoted only one in the evidentiary section. A portion of Exhibit 6-B is set forth in a footnote to the Opinion (infra, p. 42-A, n. 33). The court's description of that exhibit and designation of its form, method of preparation, internal indicia of authenticity, routine transmittal and filing is so inadequate that petitioner has reproduced it in full, together with some

of the evidence upon which the trial court properly relied in admitting it. (Appendix B, infra, 68-A).[8]

In the face of overwhelming foundation evidence, the trial court's findings, lack of request for limiting instructions and careful observance of the co-conspirator rule at the trial, the court below was limited by the record to reviewing the evidence *en masse* and reversing upon sweeping legal rules of exclusion applicable to the Business Records Act and to "acts and admissions" made in the course and furtherance of a conspiracy.

ARGUMENT

Introduction

This case squarely presents the issue of whether or not *Palmer v. Hoffman* is authority for excluding from the scope and application of the Business Records Act as a matter of law, documents of a particular class or nature despite the Act's application to "any writings or record." It also squarely presents the issue of whether or not the general exclusionary rules of evidence adopted by the court below effectively foreclose any litigant from seeking, proving or sustaining upon appeal any redress under the anti-trust laws, upon hitherto well-established principles of law.

The evidence here excluded as a matter of law is of the same type and nature repeatedly admitted and considered by this and all other courts in all

[8] Thus, the salesman signed his full name, not merely "Art." Although the last name is illegible on the photo copy introduced at the trial, Respondents knew his last name and set it forth in their specifications of error to the court below. It was dated and refers to a conversation "today." It bears a regular file number and the stamps or names of three company officials, including the Seattle District and Western States Sales Managers. It is on a printed memo form 405-A, supplied by the company to its salesmen to be used for company business. It is one of a large number of similar exhibits introduced in evidence by both sides. (Infra. p. 68-A).

anti-trust cases, i.e., "memoranda, letters, and telegrams * * * interoffice communications * * * [dealing] with such matters as the marketing and pricing policies and activities of the company, of other [defendant] oil companies, or of customer or competing service station operators." (Opinion, infra, p. 38-A)

Such documents are usually the best and often the only relevant evidence in an anti-trust case.[9] The decision below holds that the recorded course of conduct of large corporations is inadmissible as a matter of evidentiary law when that course of conduct must be proved to show a violation of substantive law. The very means by which the illegal enterprise is accomplished are thus shielded from inquiry. Such a result is not required by any known principles of law and cannot be countenanced upon basic principles of justice as applicable to the law of evidence as any other branch of the law.

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[9] *United States v. Socony-Vacuum Co.*, 310 U.S. 150 (1940), notes 24 and 32 at pp. 183, 190.)

Ethyl Gasoline Corporation v. United States, 309 U.S. 436 (1940) (policing of jobber gasoline prices by a party who neither manufactured nor sold gasoline to jobbers);

United States v. Univis Lens Co., 316 U.S. 241, 245 (1942) (instructions to field representatives not to sell to price cutters, and inquiry concerning price cutting activities);

American Tobacco Co. v. United States, 328 U.S. 781 (1946) ("widespread and effective conduct on the part of petitioners in relation to their existing or potential competitors" (p. 789), including inter-office communications reporting "upon the progress of this battle" with 10-cent brands and prophesying the results. (p. 806-07) Such evidence was specifically held admissible in *American Tobacco Co. v. United States*, 147 F. 2d 93, 118 (CCA 6th 1944), aff'd. 328 U.S. 781.

United States v. United States Gypsum Co., 333 U.S. 364, 386 (1947) ("Complaints * * * by licensees as to their competitors' failure to maintain prevailing prices.")

Hartford-Empire Co. v. United States, 323 U.S. 386, 401 (1945) affirming *United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 553 (D. C. Ohio, 1942). ("It is hard to imagine a case in which a court would have more first-hand information of what the parties did and intended.")

Schine Chain Theatres v United States, 334 U.S. 110, 116-17 (1948). See particularly Appendix B to the Government's Brief and District Court decision admitting over objection inter-department communications made in the "ordinary and usual capacity" of the duties of Branch and District Managers of non-party distributors, 63 F. Supp. at p. 242.

> "The fundamental basis upon which all rules of evidence must rest--if they are to rest upon reason—is their adaptation to the successful development of the truth." *Funk v. United States,* 290 U.S. 371, 381 (1933).

Documents of the nature here excluded as a matter of law have thus been admitted in anti-trust suits under the common law rule admitting entries made in the regular course of business,[10] as acts, declarations and admissions,[11] and under the Business Records Act.[12] The only way the court below could reverse the judgment was to ignore all such factually relevant precedents and "formulate rigid rules for the exclusion of evidence"[13] contrary to Rules 43 and 61 of the Federal Rules of Civil Procedure and well-recognized principles governing appellate review.[14]

I. PALMER V. HOFFMAN DOES NOT COMPEL EXCLUSION OF A DEFENDANT'S BUSINESS RECORDS WHEN OFFERED AGAINST IT, BECAUSE SUCH RECORDS DEAL WITH THE ACTIVITIES OF CO-DEFENDANT COMPETITORS.

The court below held that "writings dealing with the pricing and marketing policies" of a defendant

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[10] *Paterson v. United States,* 222 Fed. 599, 640-41 (CCA 6th 1915), cert. denied, 238 U.S. 635; *Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co.,* 18 F. 2d 934 (CCA 2d 1927); *Cub Fork Coal Co. v. Fairmont Glass Co.,* 19 F. 2d 273 (CCA 7th 1927).

[11] *American Tobacco Co. v. United States,* 147 F. 2d 93, 118 (CCA 6th 1944); *Johnson v. J. H. Yost Lumber Co.,* 117 F. 2d 53, 59 (CCA 8th 1941).

[12] *United States v. General Motors Corp.,* 121 F. 2d 376, 409 (CCA 7th 1941), cert. denied, 312 U.S. 618; *United States v. United Shoe Machinery Corporation,* 89 F. Supp. 349, 354, (D. C. Mass. 1950).

[13] *Michelson v. United States,* 335 U.S. 469, 487 (1948), Mr. Justice Frankfurter concurring.

[14] *DeYoung v. Campbell,* 151 Wash. Dec. 1, 7; 315 P. 2d 629, 633 (1957). ("In this state, the ruling of the trial judge in admitting or excluding such records [under the uniform business records as evidence act] is given much weight and will not be reversed unless there has been a manifest abuse of discretion.")

National Surety Corporation v. Bellah, 245 F. 2d 936, 941 (CCA 5th 1957); ("presiding as we do, to administer justice, we should hesitate long either in establishing, or in acquiescing in any new rule which bars the receipt of credible, relevant, probative evidence bearing directly on the truth of a significant issue.")

Duff v. Page, 249 F. 2d 137, 139-40 (CCA 9th 1957) ("Courts of review have a higher function than to be 'impregnable citadels of technicality.'")

other than the one that made them "are not business records," because they relate "to some incident, circumstance, or activity outside that business . . . notwithstanding it may have been made in keeping with systematic and routine procedures, and concerns a matter of importance to the business." (Opinion, infra, p. 40-A). The direct and only relevant authority for its holding is language of *Palmer v. Hoffman.*[15] The court below recognized that the fundamental ruling of the case was that business records are admissible because of the factual probability of trustworthiness arising out of all of the circumstances of the purpose and manner of making the record. It totally ignored the fact that *Palmer v. Hoffman* held a self-serving statement was properly excluded by the trial court.

> "In [Palmer v. Hoffman], an employee's statement, offered in evidence on behalf of (not against) his employer, was held inadmissible under the similarly worded federal staute, because the alleged 'course of business' was such as obviously to make for (not against) untrustworthiness."[16]

In this case, the employee's written statements were offered against (not for) respondents and were prepared for use in respondents' business.[17]

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[15] The court also cited *Clainos v. United States*, 163 F. 2d 593 (App. D.C. 1947). The court there held it error but not prejudicial error to have admitted a police record of convictions in a criminal action, because: (1) a special statute governed proof of convictions; (2) the police record was not properly authenticated as a business record, and (3) the police record did not possess intrinsic reliability because convictions are the business of the courts and not the police.

[16] *Slifka v. Johnson*, 161 F. 2d 467, 469 (CCA 2d 1947), cert. denied, 332 U.S. 758. Frank, Circuit Judge, concurring. His comment is specially pertinent, since he wrote the Circuit Court decision in *Palmer v. Hoffman*, which was affirmed by this court. *Peklis v. Trans-continental & Western Air*, 187 F. 2d 122, 130 (CCA 2d 1951), cert. denied, 341 U.S. 951, points out that introduction of documents against the maker is a proper circumstantial fact to be taken into account, since it "tends to show that they were not contrived by the entrant for litigation."

[17] The type of communication that has "the highest validity" as evidence, *United States v. Corn Products Refining Co.*, 234 Fed. 964, 978. (D.C. N.Y. 1916). "It is hard to imagine" better "first-hand information of what the parties did and intended" *United States v. Hartford-Empire Co.* 46 F. Supp. 541, 553 (D.C. Ohio 1942).

They were not self-serving statements made for use in litigation.

As a factual matter, the court's ruling below flies in the face of economic reality and the testimony of all of the witnesses of the actual operation of the petroleum business.

It was undisputed that each of the respondents —as a vital, necessary and regular part of its own business—regularly investigated the pricing and marketing policies of the other respondents.

> "I think it is imperative that we all keep up with competition. We have to know what competition is doing. Certainly, I don't think we would stay in business long if we didn't." (R. 4512)
>
> "I was working for Richfield, and as such I tried to be aware, as much as possible of competitive stations." (R. 5570)
>
> "Competitive conditions in an area have a direct effect on a station's gallonage." (R. 6026)
>
> "We were supposed to be aware of the competitive conditions at all times in our territory." (R. 5562)
>
> " 'Do you sell oil in the regular course of business?' 'Yes.' 'Well, do you take your surveys or do you ask for these reports in the regular course of business?' 'Yes, from time to time we do.' " (R. 3872).

The decision below is as contrary to legal principles as it is contrary to actual practice in the marketplace. In the identical context of an anti-trust case, the Seventh Circuit held that such reports were business records under the predecessor of the present statute. *United States v. General Motors,* 121 F. 2d 376, 409 (CCA 7th 1941), cert. denied, 314 v. S. 618. In the same anti-trust context, *United States v. United Shoe Machinery Corporation,* 89 F.

Supp. 349 (D.C. Mass. 1950) held that the Business Records Act was broad enough to encompass what business practice made a business record. As a purely legal proposition, *Pollack v. Metropolitan Life Insurance Co.*, 138 F. 2d 123 (CCA 3rd 1943), held a child's birth certificate admissible under the Act to show the parent's age, even though there was no requirement that his age be set forth or indeed had any connection with the birth of the child. The reasoning of the court below would exclude all medical, hospital, accountant, advertising agency or similar records, for surely such records relate primarily to the business of the patient, client or customer and not to the business of the record-maker.

II. EXCLUSIONARY RULES OF EVIDENCE LIMITING THE TYPE AND NATURE OF DOCUMENTS ADMISSIBLE UNDER THE BUSINESS RECORDS ACT.

By excluding all evidence which connected the practice of one company with another and the knowledge of each of the practices and policies of the other, it is obvious that no evidence directly relevant to the issue of a conspiracy could be admissible. The court below might well have concluded its opinion. The court, however, stated a number of other exclusionary rules that would cover any documents it might not have included within the first class.

1. Inadmissibility of writings giving reasons for actions of others.

The court below held that reasons given for economic actions of others were not proper subjects for expert opinion, and hence any document stating why another company or non-customer bought or

sold, fixed a price or refused to buy or sell could not be a business record as a matter of law.

Once again, the court below cited no relevant authority for its ruling[18] and ignored the fact that the very inquiry of the trial was to show the economic effect of, reason for and knowledge of each respondent of various marketing and pricing policies. The expression of opinion—the reason—was itself the operative fact to be proved and was the purpose of offering the document. This and all other courts have always held that the reason for or probable consequences of economic action in the marketplace is admissible in an anti-trust action.[19]

It is not rational or logical to say that economic reasons for action in the marketplace reported by employees of a participant in the market are inherently untrustworthy because such reasons "do not call for professional or scientific knowledge or skill" (Opinion, infra, 41-A), and hence inadmissible against the person making and keeping such reports.

2. Writings attributing information to others not under a legal duty to furnish such information.

The court below held that writings reporting information obtained by a field representative from

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[18] It cited many cases holding expert opinion admissible under the Act.

[19] *Lawlor v. Loewe*, 235 U.S. 522 (1914) (reasons given by customers of the plaintiff's dealers for refusals to deal).

Anchor Cooperative Serum Ass'n. v. Anchor Serum Co., 153 F. 2d 907, 912 (CCA 7th 1946), cert. denied, 329 U.S. 721, (reasons plaintiff's druggists gave why they couldn't sell plaintiff's serum).

Greater New York Live Poultry C. of C. v. United States, 47 F. 2d 156, 159 (CCA 2d 1931), cert. denied, 283 U.S. 837, (reasons "given by receivers for their refusal to sell to recalcitrant marketmen.")

In that case, as in this, the defendants sought to exclude all evidence entirely rather than a limiting instruction. The Second Circuit, unlike the court below, would not elevate a deliberate or inadvertent failure to utilize proper procedures into reversible error of the trial court. Evidence so admitted may be considered for its probative weight by judges or juries. The trial court cannot be put in error for not restricting the effect of evidence absent a request to do so. *Lauderdale County v. Kittel*, 229 Fed. 593, 602 (CCA 5th 1916); *Tevis v. Ryan*, 233 U.S. 273 (1914).

service station operators being supplied by another company were inadmissible because the

> "information comes to the entrant or maker from unauthorized persons, * * * not because it contains hearsay." (Opinion, infra, p. 42-A).

The court below cited three cases nominally supporting this conclusion, recognizing that two circuits held squarely to the contrary.[20] *United States v. Grayson,* 166 F.2d 863 (CCA 2nd 1948), a criminal case,[21] however, is the only case supporting the court's ruling.[22] *United States v. General Motors Corp.,* 121 F. 2d 376, 409 (CCA 7th 1941), cert. denied, 314 U.S. 618, an anti-trust case, held admission of such evidence "was not improper," "treated either in isolation or in its entirety."

The ruling is, moreover, plainly in conflict with the second paragraph of § 1732, which provides that "lack of personal knowledge" by the maker "shall not affect its admissibility," but merely go to the weight of the evidence.[23]

The ruling below that "hearsay" shall henceforth go under the alias of "unauthorized persons" is either pointless or destructive of orderly trial procedure. The ruling must require the offering party to show personal knowledge of the party making

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[20] Opinion, infra. p. 42-A, n. 32).

[21] Admission of such evidence at the behest of the prosecution might raise grave constitutional questions. See Frank, Circuit Judge, concurring, in *Slifka v. Johnson,* 161 F. 2d 467, 470, note 4 (CCA 2d 1947), cert. denied, 332 U.S. 758.

[22] In *Clainos v. U. S.,* 163 F. 2d 593 (App. D.C. 1947), another criminal case, the language relied upon was, at best, dicta. In *Gencarella v. Fyfe,* 171 F. 2d 419 (CCA 1st 1948), the document offered was conceded not to be a business record. *Pollack v. Metropolitan Life Ins. Co.,* 138 F. 2d 123 (CCA 3d 1943) expressly held to the contrary in deciding that a father's age could be proved by his child's birth certificate, even in the absence of any duty whatsoever to enter his age upon the certificate and no apparent showing of who furnished such information.

[23] *Wheeler v. United States,* 211 F. 2d 19, 23 (App. D.C. 1954), cert. denied, 347 U.S. 1019.

United States v. Costello, 221 F. 2d 668, 678 (CCA 2d 1955), aff'd. 350 U.S. 359. ("We conduct our most serious affairs on the strength of [hearsay]. It would be impossible to carry on a day's business without it.")

the record or permit the inquiring party to examine on voir dire to show that the source of information might have been an unauthorized person. The statute declaring that lack of personal knowledge shall not affect admissibility thus becomes the vehicle for interminable courtroom inquiry into that which the statute declares irrelevant insofar as admissibility is concerned.

The court ignored the fact that the salesmen were authorized and directed to obtain and report just such information, or at least to obtain information that could only come from a competing company or non-customer service station. How, for example, could one company determine upon an allowance to be made unless it inquired of a non-customer the price that it had to meet? The respondents themselves introduced numerous exhibits attesting to the fact that such information was vital "if we are to retain our business,"[24] necessary to determine dealer assistance,[25] taken into account when new outlets were under consideration,[26] and in efforts to solicit new business, including petitioner himself.[27] In all of these situations and many more the information employees were authorized and directed to gather and upon which the company necessarily relied could come only from what the court below held were "unauthorized persons." Respondents made not the slightest effort to prove that any information reported was unauthorized or to prove

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[24] Richfield, Ex. A-185, a price and price sign survey with a direction to meet "competition from other majors."

[25] Texas, Ex. A-62, a statement of policy of when and how dealer assistance was to be given—requiring investigation of competitive conditions before allowance is made and withdrawal as soon as competitive conditions permit.

[26] Standard, Ex. A-77, A-83, A-119 and A-123, reporting upon gallonage and contractual arrangements of nearby dealers and solicitation by other defendants.

[27] Union, Ex. A-239, stating the discount Moore then had with Associated and the allowance offered by Standard. That information came either from petitioner or a Union salesman. (R. 6301-02).

any such exhibit was erroneous. Respondents never asked that any such documents attributing information to "unauthorized persons" be limited to the fact that the statement was made and reported. Failure to request an instruction limiting the document to the purpose for which it was offered cannot make a business record inadmissible.

Surely, a document showing the source of market information is at least as reliable and trustworthy as one similarly prepared containing the same information acquired from totally unknown sources.

3. Stamping, initialing and filing must be required, as distinguished from authorized, practice.

The court below recognized that some, if not all, of the exhibits were established as having "been prepared in the course of the writer's duties as an employee of the company" and that "a good many" have stamps or initials showing receipt and circulation among company officials. Even these documents were held inadmissible unless it was also established "that the internal procedures of the company required" each document to be so transmitted, stamped and filed "as a matter of routine." (Opinion, infra, p. 43-A)[28] The distinction here made is so finespun as to be almost unintelligible. It holds that documents proved to be made, transmitted and stamped in accordance with the *regular practice* of the company must be further supported by a showing that each step in the process was also "re-

[28] The routine nature of stamping documents, circulating and filing them was established generally during the course of authenticating the first few of a series of documents bearing such stamps. This testimony was not usually repeated for other subsequent documents bearing the same or like stamps and showing the same or like initialing.

quired," as distinguished from merely "authorized."[29]

4. Casual and informal matters are "self-evidently" not required routine.

Not satisfied, perhaps, with the merits of excluding the documents on such a ritualistic basis, the court below ignored the evidence and held it "self-evident" that the routine described by the witnesses was non-existent, because they "were casual and informal in nature" and were "seeking or providing information of a kind which could be, and no doubt often was, communicated by telephone[30] or in conference." (Opinion, infra, p. 43-A) The informal nature of the writing was recognized by the court as being no bar to admissibility.[31] Hence, its holding is that writings disclosing the casual and informal day to day conduct of a business are inherently untrustworthy—directly contrary to the genesis of the Business Records Act, and *Palmer v. Hoffman.*[32]

5. Adherence to a regularly established business procedure for contemporaneous rcording.

Most documents offered in evidence showed on their face that they were reporting an act, trans-

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[29] Petitioner did establish that "when documents are sent through some sort of chain of command or some sort of series of people for their notice and stamp" it was "just as a part of our regular business." (R. 3915)

[30] Stenographic transcriptions of telephone conversations regularly made as a matter of practice—not duty—in a Government office are admissible as Government records under 28 USC § 1733 (a). *Connelly v. United States*, 249 F. 2d 576, 587-88 (CCA 8th 1957).

[31] Opinion, note 35, infra, p. 44-A, citing *Smith v. Bear*, 237 F. 2d 79 (CCA 2d 1956).

[32] The court itself started from the premise that "the probability of trustworthiness * * * lies in the fact that they are routine reflections of the day-to-day operations of the business in whose files the memoranda and reports are found." Petitioners cannot explain—nor perceive any rational explanation—of how the fundamental basis for admission of business records becomes a rule of exclusion. The court below did not purport to reconcile the patent inconsistency between its statement of the rule and its application.

action, occurrence or event contemporaneous with their date or an existing policy or practice bearing upon a matter being reported. Few objections were made by respondents on that point.[33] As the court below subsequently pointed out, it is not error to admit a writing in evidence where some entries were made several months and others an unknown time after the event in the absence of "evidence to show that this lag introduced inaccuracies or uncertainties as to * * *reliability." (Opinion, infra, p. 59-A). As in all other cases respondents failed to offer any factual attack upon the authenticity or accuracy of any document upon this basis, despite ample opportunity to do so.

III. ACTS, DECLARATIONS AND ADMISSIONS

The court below held all inter-office communications were inadmissible, because: (1) absent disclosure, there is "no room for application of the rule that the statement is the principal's if the agent or employee was authorized to make it to a third person" (Opinion, infra, 49-A),[34] and (2) hence the statement could only become the principal's by adoption by "its shareholders, board of directors or authorized management officials" (Opinion, infra, 50-A).

The court cited no authority whatsoever for either of its rulings. It erroneously assumed that the governing rule was that relating to admissions against interest rather than the rule admitting acts,

[33] In their Specification of Error (pp. 37-113) respondents list no such pointed objection under the heading "Grounds of Error" for any of the exhibits they discuss in detail.

[34] This erroneous premise was necessary in view of the overwhelming direct, circumstantial and internal evidence that each such report or letter was made in the usual and ordinary course of the writer's business as a part of his normal duties and hence at least impliedly authorized.

declarations and admissions made in the course and furtherance of a conspiracy.

For "admissions against interest" disclosure is required, since one can't admit something against his own interest to himself. For an act, declaration or admission, however, "It is immaterial that the admission, when made in writing, is found in a paper * * * not communicated to anyone else." (*Wigmore,* 3rd Ed. § 1073(2), Vol. III, p. 90)[35]

Other courts, entirely aside from the rule of disclosure, hold that an agent's authority to make a binding admission is co-extensive with his authority to bind his principal to substantive liability.[36]

In the substantive section of its opinion, the court below correctly considered statements made by salesmen and other representatives of the respond-

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[35] *Schine Chain Theatres v. United States*, 334 U.S. 110, 116 (1948) (inter-office memos and letters found in the files of non-party distributors were admissible "as declarations" and admissible against defendant, as well, because the distributors were conspirators, even though not parties)

American Tobacco Co. v. United States, 147 F. 2d 93, 118 (CCA 6th 1944) (correspondence from field representatives).

United States v. General Electric Co., 82 F. Supp. 753, 902-03 (D.C.N.J. 1949); *Patterson v. United States*, 222 Fed. 599, 636-637 (CCA 6th 1915), cert. denied, 238 U.S. 635, (reports of salesmen and sales agents to their superiors).

Pekelis v. Transcontinental & Western Air, 187 F. 2d 122, 128 (CCA 2nd 1951), cert. denied, 341 U.S. 951, (admissibility depends on whether the writing is "inconsistent with the position taken by the defendant during the trial.")

See also *Selber v. Springbrook Trout Farm*, 19 Wash. 49, 52 Pac. 238 (1899) a statement by the defendant's foreman first produced at the trial was the defendant's admission; *Skibsaktieselskapet Bestum III v. Duke*, 131 Wash. 467, 479-81, 230 Pac. 650, 655 (1924) where it was stipulated that documents were sent and received and that copies were deemed originals (as was here stipulated and proved) the documents were admissible, including a resume sent by the principal to the agent of all correspondence between them.

[36] *Johnson v. J. H. Yost Lumber Co.*, 117 F. 2d 53 (CCA 8th 1941), ("ordinary incidents" of the job of local yard managers); *United States v. Schine Chain Theatres*, 63 F. Supp. 229, 238-39 (W.D.N.Y. 1945), (representations by branch and district managers "within the scope of their duties * * * as a natural incident of the office."); *Overfield v. Pennroad Corporation*, 42 F. Supp. 586, 628 (D.C. Pa. 1941).

Long before the Business Records Act, this court held that one might prove an agent's authority to do an act or make a declaration "either by the course of the business, or by express authorization." *The United States v. Gooding*, 12 Wheat 461, 469 (1827).

Slifka v. Johnson, 161 F. 2d 467 (CCA 2d 1947), cert. denied, 332 U.S. 758.

ents proved by testimony of persons who heard the statement as "acts and extra-judicial declarations" (Opinion, infra, 34-A), and, of course, did not sustain respondents' arguments that such evidence was improperly admitted.[37] It is inconceivable that evidence of acts, declarations and admission of salesmen may properly be proved by the recollection of witnesses who heard the employee's statement, but not by a writing prepared by the employee himself.

IV. SUBSTANTIAL JUSTICE

The Court below reversed solely upon legal grounds barring admission of any of the documentary evidence.[38] It carefully refrained from discussing authentication, in fact, of any single document as a Business Record or an admission. Petitioner knows of no case where greater care was taken by the trial court or more time devoted by the court, jury and litigants in meticulous authentication of each writing.

No case could better illustrate denial of substantial justice contrary to the purpose of Rules 43 (a)

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[37] For example, a service station operator testified:

"I asked Mr. Carter [an employee of Standard], if we took our signs down, when the rest of them would be down. * * * He said they would be down as soon as possible." (R. 1906). The opinion below itself quotes this testimony, infra, p. 31-A. It was specified as error at p. 30, p. #15 of Respondents' Specifications of Error.

[38] The few other errors discussed were inconsequential and related only to minor matters to be avoided upon re-trial:

A hypothetical question should "be framed to omit this irrelevant factor." (Opinion, infra, p. 53-A)

"Certain events" should not be considered by the expert witness in giving his opinion of value. (Opinion, p. 53-A)

Moore's tax returns should not have been admitted insofar as his business income was concerned, because there is no authority for admission of such records as annual summaries of ledger accounts. But see A.L.I. Model Code of Evidence (1942) p. 237, (tax returns are against interest and relevant and admissible to show income at least to the extent that it requires payment of tax) and *Tretheway v. Green River Gorge, Inc.*, 17 Wn. 2d 697, 730, 136 P. 2d 999, 1013 (1943) (tax returns were not an acknowledgement of a barred debt, but were relevant to show a continuing contract).

and 61.[39] Petitioner, a service station operator whose valuable business was destroyed in 1952 by respondents, is saddled with $23,729.03 in costs and relegated to a re-trial six years later with all of the documentary evidence inadmissible and witnesses possibly dead or out of reach[40] before retrial can be had.

Petitioner has been penalized by respondents' objections to documents as admissions and compliance with the trial court's requirement of the extra proof necessary under the Business Records Act "to make doubly sure that there would be a legal authentication." (infra p. 7).

If the lower court's legal obstacles to the admissibility of evidence stand unreversed, then no anti-trust case[41] can be tried within the confines of the Ninth Circuit. If these legal obstacles to the admission of evidence are correct, none of the substantial anti-trust cases reaching this court should have been decided adversely to the defendant.[42]

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[39] "When these rules are applied by a court or jury with average power to judge creditability better results are apt to be obtained than by the use of many technical and refined rules that * * * (b) are so difficult in application, that their method of application can be drawn in question by an appellant with a fair chance of securing a reversal that has no relation to the merits involved." Moore's Federal Practice ¶ 42.02 (3).

[40] Under Washington law respondents may execute, levy and buy up petitioner's cause of action unless he is willing and able—after destruction of his business—to pay respondents all of the costs engendered by respondents sterile hermaneutics on the law of evidence. *Johnson v. Dahlquist*, 130 Wash. 29, 225 Pac. 817 (1924). Any appellate review that adopts such technicalities or rewards such trial procedure must be justified by compelling fundamental reasons of justice and fair play.

[41] Or similar mail fraud or tax fraud cases involving masses of documentary evidence can be tried or if tried be free of error. *Moore v. United States* No. 16804 (CCA 5th) decided March 18, 1958, unreported to date. Summary copy of tax return prepared by agent from pencilled return shown by taxpayer and an unsigned return accountant testified appeared to be the copy he had prepared—both authenticated in part by a "routine serial number" stamp.

[42] Thus, in *Hartford-Empire Co. v. United States*, 323 U.S. 386, 401 (1945) the court affirmed the judgment against the Lynch Corporation over its conten-

It would border on malpractice for defendants' attorneys to ever stipulate to the admission of any documentary evidence, all of which is inadmissible under the lower court's decision.[43] No private plaintiff[44]—probably not even the Government—could afford the time and money required to surmount the exclusionary rules adopted below if that should be possible at all. Few judges could survive the mountains of minutiae that would result if anyone attempted to do so.[45]

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tion that the only evidence against it were memos exchanged by officers of other defendant corporations. (App. Brief. No. 7. p. 3)

United States v. National Lead Co., 332 U.S. 319, 327 (1947) affirmed the judgment against duPont, its principal basis of appeal being that the only evidence connecting it to the conspiracy was one or two incompetent communications between or within branches of other defendants. The nature of these letters and inferences drawn from them are set out by the District Court (63 F. Supp. at pages 520-531). This court merely referred to these pages in stating "we find in those facts the support necessary for the conclusion reached.")

Use and reliance upon such evidence in the *de novo* hearing of these equity cases necessarily falls within the "rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity" referred to in Rule 43(a) F.R.C.P. By the express terms of Rule 43(a) like evidence is made admissible in all other cases.

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 254 (1940) this court affirmed conviction of R. H. McElroy, Jr., over his contention that several memos and an inter-office letter were not substantial competent evidence against him.

[43] In a cryptic aside, the court below indicated that all of the evidence offered might be admissible without any foundation evidence at all. (Opinion, infra, p. 49-A, note 39). Petitioner cannot conceive that a court of appeals would callously play such an ironic jest upon petitioner as to reverse the judgment because respondents required him to unnecessarily prove a foundation for the documentary evidence as business records and as acts, declarations and admissions.

[44] "The treble damage action is a sanction allowed to a private litigant because of the public interest." *Karseal Corporation v. Richfield Oil Corporation*, 221 F. 2d 358, 365 (CCA 9th 1955). "The treble damage was intended * * * to aid in achieving the broad social object of the statute." *Fanchon & Marco v. Paramount Pictures*, 100 F., Supp. 84, 85 (S. D. Cal. 1951) aff'd. 215 F. 2d 167, cert. denied, 348 U. S. 912.

[45] It is possible that the court below deemed its ruling to be an expedient way to dispose of the big case as discussed in the Prettyman Report. If so, its ruling is contrary to the conclusions of that report. A trial judge must have more, not less, power in deciding what is relevant, material, admissible or excludible. See *United States v. Apuzzo*, 245 F. 2d 416, 420-21 (CCA 2d 1957), cert. denied, 355 U.S. 831.

CONCLUSION

If the Business Record Act is to have any utility, trial judges' effective control of their courtroom and cases, or the anti-trust laws any enforcement, this court should grant certiorari and reverse the decision below.

Dated at Seattle, Washington, May 2, 1958.

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No. 14,927

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

STANDARD OIL COMPANY OF CALIFORNIA, a corporation; SHELL OIL COMPANY, a corporation; THE TEXAS COMPANY, a corporation; RICHFIELD OIL CORPORATION, a corporation; TIDE WATER ASSOCIATED OIL COMPANY, a corporation; and UNION OIL COMPANY OF CALIFORNIA, a corporation, *Appellants,* vs. GEORGE F. MOORE, *Appellee.*	No. 14,927 Nov. 6, 1957

Appeal from the United States District Court, Western District of Washington, Northern Division.

Before: Stephens, Chief Judge, and Pope and Hamley, Circuit Judges.

HAMLEY, Circuit Judge:

This is a treble-damage antitrust suit, brought by George F. Moore, a former Seattle gasoline service station owner and operator, against seven major oil companies.[1] Charging defendants with the de-

[1] Standard Oil Company of California (Standard), Shell Oil Company, Incorporated, a Virginia corporation, The Texas Company (Texas), Richfield Oil Corporation (Richfield), General Petroleum Corporation (General), Tide Water Associated Oil Company (Tide Water), and Union Oil Company (Union). Prior to trial, Shell Oil Company (Shell), a Delaware corporation, which, on September 30, 1949, succeeded Shell Oil Company, Incorporated, was made an additional party defendant. At the close of the trial, the court granted a motion for a directed verdict as to Shell Oil Company, Incorporated, and a judgment of dismissal as to this defendant was entered.

struction of his business, plaintiff sought treble damages in the amount of $285,000. He also asked for a decree requiring defendants to divest themselves of all interest in, or control of, retail service stations in the competitive area. Attorneys' fees in the sum of $40,000 were requested.

After a trial which lasted more than three months, the jury returned a verdict of $80,000 trebled, or a total of $240,000. Judgment in this sum, and for attorneys' fees in the amount of $40,000, was entered on June 24, 1955. The prayer for equitable relief was denied.

Defendants appeal. Under five general specifications of error, they question the sufficiency of the evidence to support the verdict, the manner in which the coconspirator rule was applied, the admissibility of some of the evidence, the failure to give certain instructions, the giving of other instructions, and the failure to set aside the verdict because of asserted extraneous influences upon the jury.

I

BACKGROUND OF THE CASE

Each of the appellants is engaged in the business of producing and refining oil, and in transporting and marketing gasoline, oil and other petroleum products, in Washington and other states. The production and (at the times here in question) refining operations take place in California. Transportation to the state of Washington is generally by ship tanker. The gasoline is received by appellants at their respective marine storage terminals, and from there it is distributed to bulk storage plants located at convenient marketing centers.

Distribution from these terminals and plants falls generally into four categories: Sales to independent

service station dealers; retail sales at company-operated stations; sales to secondary wholesale distributors or jobbers; and sales to large commercial, agricultural, and industrial consumers. Except for appellants, only one company transports gasoline into the Puget Sound area of Washington, and then only in relatively small amounts. During the period in question, there was no well production of petroleum products in the state of Washington.

In 1939, Moore opened a retail gasoline service station and truck service station at 1961 Fourth Avenue South, in Seattle. Except for eight months in 1944, when he served in the army, Moore operated this station continuously until August, 1952. Throughout this period, Moore obtained his gasoline and other petroleum products from Tide Water.

Moore was an extremely competitive dealer. While Tide Water required him to post retail gasoline prices on his pumps, it was his practice to give discounts which resulted in a net gasoline price lower than the posted price. Generally speaking, this discount, which he gave to all customers, was three cents a gallon.

Moore's business was successful from the beginning. This was due to his pricing policy, the excellence of his location, the efficiency of his operation, his ability as a salesman, and perhaps other factors. His business grew steadily, year by year, until he became the largest Tide Water dealer in the state of Washington. Eight employees were required to operate the station. By 1951, his annual gasoline sales exceeded 1,600,000 gallons.

Commencing in 1950, however, disagreements developed between Moore and Tide Water. The nature of these disagreements will be discussed at a later point in this opinion. Late in 1951, Moore began

looking around for another source of supply. He had conversations with representatives of Standard and General. At that time, however, both of these appellants declined to deal with Moore. Negotiations between Moore and representatives of Union, begun in October or November, 1951, were still in progress in May, 1952.

On May 2, 1952, Moore received a written notice from Tide Water, canceling its contract with him, effective July 30, 1952.[2] He continued his negotiations with representatives of Union during the period from May 2 to July 30, 1952. In June or July, 1952, Moore also had several conversations with representatives of Richfield. Before the end of July, however, Richfield indicated its refusal to deal with Moore on the basis which he proposed.

Tide Water supplied no gasoline or oil to Moore after July 30, 1952. By utilizing the large capacity of his storage tanks and obtaining relatively small quantities of gasoline from independent sources, Moore was able to operate his service station for a few days after that date. During this period, negotiations continued with Union, and were reopened with General. Moore also made a "last-minute" effort to obtain gasoline from each of the other appellants.

As events turned out, Moore did not obtain a continuing supply of gasoline and diesel oil from Union, General, or any other source, following termination of the Tide Water supply on July 30, 1952. When Moore's stored supply became exhausted about the middle of August, 1952, he closed his service sta-

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[2] We use the term "contract" to include the entire contractual arrangement between Tide Water and Moore concerning the supply of petroleum products. Actually, there were five written instruments, including two leases, a petroleum products sales agreement, a merchandise agreement, and a delivery allowance letter, all of which were referred to and canceled in Tide Water's notice to Moore.

tion. The complaint in this action was filed on October 4, 1952.

The theory of the action is that Moore was refused a supply of gasoline pursuant to, and in furtherance of, an agreement, combination, or conspiracy in restraint of, or to monopolize, interstate trade and commerce, entered into by two or more of the appellants.[3] Jurisdiction to entertain the action and grant the requested relief is asserted under several sections of the Sherman, Clayton, and Robinson-Patman Acts (15 U.S.C.A. §§ 1, 2, 13, 13a, 14, 15, 18, and 26).

In Moore's first amended complaint, the alleged unlawful agreement, combination, or conspiracy is pictured as one to accomplish a dual purpose through multiple lines of action. It is asserted that the general objectives were to control, fix, and regulate gasoline prices, and to monopolize, control, and channelize the distribution of gasoline.[4] The plans and programs adopted in furtherance of these objectives, Moore alleges, relate both to the refining and to the distribution of gasoline.

Concerning the refining of gasoline, these plans and programs, according to the complaint, called for self-imposed controls and restrictions upon ap-

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[3] The term "conspiracy" is not used in the complaint. The facts therein alleged, however, are comprehensive enough to encompass conspiracy as well as unlawful agreement or combination. A conspiracy is a joint undertaking having an unlawful purpose, arising out of agreement, and usually extending over a period of time. U. S. v. Kissel, 218 U. S. 601; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465. See, also, Piquett v. United States (7 Cir.), 81 F. (2d) 75, 80. The briefs of all parties deal with the question of "conspiracy" as an issue in the case. Likewise, the trial court instructed fully, and without any objection being interposed, on the meaning of the term "conspiracy," and the application of the law of conspiracy to the facts of this case.

[4] In the complaint, "gasoline" is defined to include diesel fuel.

pellants' own activities.[5] With respect to the distribution of gasoline, it is alleged that these plans and programs included not only self-imposed controls and restrictions, but also the imposition of various forms of economic pressure and coercion upon wholesale distributors and retail dealers.[6]

As compared to the sweep of these allegations, the averments concerning the way in which the asserted unlawful agreement, combination, or monopoly injured Moore raise a relatively narrow issue. It is not alleged that during the time he was engaged in business Moore's profits or costs were affected in any manner by reason of the production, refining, transportation, storage, marketing, or pricing policies referred to above. The way in which Moore was damaged, according to the complaint, was in being driven out of business at a time when the business was prospering. This was accomplished, it is alleged, by the practice of one of the forms of eco-

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[5] Self-imposed controls and restrictions pertaining to the refining of gasoline included, according to the complaint, the use of private committees to determine and impose quotas of crude oil to be produced; the purchase of gasoline produced by independent refineries and producers; the use of price-posting systems to fix and maintain uniform and noncompetitive prices to be paid for crude oil purchased from independent companies; the exchanging of crude oil among themselves; and the pooling of transportation facilities.

[6] Self-imposed controls and restrictions pertaining to the distribution of gasoline included, according to the complaint, the use of price leadership and price-posting systems for the purpose of manipulating and stabilizing prices; the exchange of gasoline supplies among appellants; and the sale to retail dealers, for resale under their respective brand names, gasoline actually produced and refined by other appellants. The forms of economic pressure and coercion imposed upon wholesale distributors and retail dealers included, it is alleged, the control and limitation of gasoline supplies, or the cutting off of supplies, of independent wholesale distributors and retail dealers who do not conform to appellants' joint price policies; refusal to permit such distributors and dealers to advertise the type or brand of gasoline sold; utilization of contract forms and other devices which permit appellants to control, adjust, and change retail prices; refusal to sell gasoline to wholesale distributors and retail dealers who will not conform to the joint price policies, or who desire to resell under low cost and cheaper methods of distribution, such as self-service gasoline stations; the artificial decreasing or depressing of gasoline prices, and the creation of so-called "price wars"; at times the prohibition of the use of "price signs" by retail dealers, and at other times the insistence that such signs be displayed; the refusal to sell gasoline to dealers who purchase gasoline from any other appellant; the acquisition, operation, and control of retail service stations; and the practice of discriminating between purchaser as to the price of gasoline.

nomic pressure contemplated by the asserted unlawful agreement, combination, or conspiracy—namely, concerted refusal to deal.[7]

Appellants filed separate answers in which they denied the allegations of the complaint concerning the alleged agreement, combination, or conspiracy, concerted refusal to deal, and monetary loss. The cause came to trial on the issues raised by these pleadings. As before noted, the jury verdict was for Moore, and the judgment conforms to the verdict.

II

SUFFICIENCY OF THE EVIDENCE—IN GENERAL

Before reaching any question as to the amount of damages sustained by Moore, the jury had to find in his favor on two other questions of fact. One of these is whether Moore was unable to obtain a supply of petroleum products which would permit him to remain in business.[8] The other is whether the inability to obtain such a supply, if this was the case, resulted from an agreement, combination, or conspiracy of the kind alleged.

The verdict represents a jury finding for Moore on both of these questions. Appellants' first specification of error challenges the legal sufficiency of the evidence to support either of these findings.

The evidence is legally sufficient to support a

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[7] Specifically, it is alleged that appellants concertedly refused to deal with Moore because he would not adhere to appellants' "artificial price fixing and price maintenance programs." Another reason attributed to appellants for their asserted concerted refusal to deal was appellants' desire to prefer and favor service station outlets which they individually owned or controlled.

[8] This was the only damage asserted to have resulted from the alleged agreement, combination, or conspiracy. If Moore did not prove such resulting damage, he would not be entitled to judgment, even assuming the existence of an unlawful agreement, combination, or conspiracy between two or more of the appellants. Wolf v. National Lead Co. (9 Cir.), 225 F. (2d) 427, 432-433, cert. den., 350 U. S. 915.

jury finding on any question of fact, if it is of such substance and character that reasonable men might reach that conclusion. In determining whether the evidence meets this test, all reasonable inferences therefrom, favorable to the verdict, are to be drawn. Likewise, all conflicts between evidence submitted by the prevailing party and the evidence submitted by the losing parties are to be resolved in favor of the verdict. Where testimony submitted by the losing party, although not directly contradicted, is inconsistent with verdict, it is to be assumed that the jury disbelieved such testimony, as it had the right to do.

In determining the sufficiency of the evidence to support the verdict, there is authority for appellate court disregard of the evidence held to have been improperly admitted. See Oras v. United States (9 Cir.), 67 F. (2d) 463, 465. Here, however, the asserted inadmissibility of evidence is based upon claimed lack of foundation testimony—which might be supplied on a new trial. It will therefore be assumed, in discussing the sufficiency of the evidence, that all evidence favorable to the verdict was properly admitted.

III

THE FINDING THAT MOORE WAS UNABLE TO OBTAIN GASOLINE

We turn first to the question of whether the evidence was legally sufficient to support a jury finding that Moore was unable to obtain a supply of gasoline which would permit him to remain in business. He sought to prove this by showing that no source of supply was available to him after Tide Water ceased deliveries on July 30, 1952.

There is no dispute between the parties as to the

nature of the proof necessary to warrant a finding that any particular source of supply was not available to Moore. As stated in the trial court's instruction No. 35, to which no objection was taken, it could not be found that a particular source of supply was unavailable to Moore unless it were shown that he offered, on a bona fide basis, to purchase gasoline and diesel fuel oil from such source, and that he was ready, willing, and able to pay the current market price of such source applicable to retail gasoline dealers of Moore's classification and category, and that such source refused to sell to him at its current market price applicable to dealers of that classification and category.

Appellants do not question the sufficiency of the evidence to support a jury finding that Moore could not then obtain a supply from appellants Standard, Texas, Richfield, Shell, or Tide Water, or from any source other than appellants. They do, however, question the sufficiency of the evidence to support the finding, inherent in the verdict, that Moore could not then obtain a supply from Union or General.

Union's Asserted Refusal to Deal. Viewing the record in the light most favorable to the verdict, we have examined the evidence bearing upon Union's asserted refusal to deal with Moore.

There were extensive negotiations between Moore and Union, beginning in the fall of 1951 and continuing to about August 20, 1952. Early in these negotiations, Moore indicated that he would like the same price arrangement on gasoline as he then had with Tide Water. This was a discount of 6½ cents off the posted retail price of regular gasoline, and 7 cents off the posted retail price of ethyl or premium gasoline. He was told that these discounts

were a half cent more than the discounts Union then gave to Fleet Service Station No. 1. The latter was a truck service station two blacks away, which did somewhat less business than Moore.

During the initial meetings, however, the Union representatives did not offer to sell to Moore at the Fleet Service figure. Nor did they state that the figure suggested by Moore was out of the question. Quite to the contrary, on three different occasions late in 1951, W. I. Martin, Union's district sales manager in Seattle, informed Moore that he believed he could get the 6½ and 7-cent price for Moore. The price of diesel oil, Moore was told, would be 10 cents a gallon, as compared to the Tide Water price of 9.2 cents. On each occasion, Moore stated that he would enter into a contract with Union on the 6½ and 7-cent discount basis for gasoline, and 10 cents a gallon for diesel. The third time this price plan was discussed, it was left that Martin would take the matter up with Union's California office.

Late in December, 1951, the Los Angeles office advised Martin that the request to take the account on the suggested basis was denied, but that it was agreeable to take the account "at policy discount." This counteroffer, however, was never communicated to Moore, and he heard nothing more from Union until February, 1952. A company representative, David E. Gray, then went to the station and told Moore that the company was not "taking any accounts like ours right then." There followed some discussion concerning a possible lease of Moore's station to Union. He was later provided with a form of agreement to effectuate such an arrangement. In the middle of March, however, Gray informed

Moore that Union was not then leasing any more stations.[9]

Union reopened negotiations with Moore in the late spring of 1952. Martin again told Moore that he believed that a discount of 6½ and 7 cents could be obtained for Moore. At a later meeting, T. G. Wise, Union's territory manager, informed Moore that he had authority from a vice president to take the account on that basis. Moore again agreed to contract on this basis, and Wise had a painting contractor measure the station for painting. Two weeks later, however, Martin told Moore that a Union vice president had ruled that it was not in the company's policy to take the account.

During all of the period referred to above, Moore was being supplied by Tide Water. Hence, Moore's inability to obtain gasoline from Union during that period bears only indirectly upon the factual question under consideration. As before indicated, that question is whether Moore was unable to obtain a supply after Tide Water terminated deliveries on July 30, 1952. But, as will be seen, Moore's inability to make headway with Union in these earlier negotiations may well have influenced the jury's interpretation of later words and events.

The next contact between Moore and representatives of Union came on the morning of Friday, August 8, 1952, when Martin went to Moore's station. By then, Moore was receiving no gasoline from Tide Water or any other source. Moore's version of this conversation is quoted in the margin.[10]

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[9] Gray testified that he then told Moore that the reason Union could not then take on his account was because the company was then in a condition of "tight supply."

[10] "A Mr. Martin came into the service station and said that he would—wanted to talk business about selling me gasoline and I said I was willing to buy gasoline. He said that—he said that they could take the station with 6 cents off of the posted price on the regular grade of gasoline, and 6½ cents off of the posted price of

This, according to Moore, is the first occasion on which a representative of Union proposed to sell gasoline to Moore at its regular truck station discount of 6 and 6½ cents. This is also the first occasion on which a representative of Union had suggested nine cents a gallon as the price for diesel. In all prior negotiations, beginning in the fall of 1951, the price quoted was 10 cents a gallon, the same as it was charging Fleet Service.

The conversation between Moore and Martin just described took place in the morning. About noon of that same day, Martin telephoned Moore. Repeating his previously expressed preference for the 6 and 6½-cent discount proposal involving the "sixty-day paper," Moore asked what Martin was going to do. On direct examination, Moore gave this testimony concerning the conversation which followed:

> "A. . . . He said, 'Well, the sixty-day paper, I find out the company doesn't want any accounts like that. They want a five-year account like that.' 'Well,' I said, 'under those circumstances, I will take the other deal that you outlined this morning for the 5½ cents off of the posted retail price and 9 cents for diesel and no paper at all.' And he said, 'I am sorry we can't take that kind of a deal, either.' "

It was thus demonstrated that Martin had been unable to gain company approval of either of the proposals he had advanced earlier in the day. Moore and Martin, continuing with their telephone con-

ethyl gasoline, and nine cents on diesel, and that was a sixty-day contract. Then he said, 'We have another plan.' He said, 'We will give you 5½ cents off of the posted price of retail, posted price on regular gasoline, and 6 cents off of the regular posted price on ethyl gasoline, and nine cents on diesel and no paper at all.'

"So I told him that I would take the one with the 6 cents off and the sixty-day paper and wanted that deal, and I said, 'Let me know right away, because I am getting low on gas.' I didn't have any deliveries of gas. So he said he would let me know."

versation, then explored other possibilities. Continuing with Moore's testimony:

> "So I said, 'Well, what can you do for me? I need gasoline.' And he said, 'Well,' he says, 'we can give you a five-year contract, and give you 6½ cents a gallon off of the posted price of the regular gasoline and 6½ cents a gallon off of the posted price, retail posted price, that is, on ethyl gasoline, and 9 cents for the diesel delivered with a five-year contract.' Q. Would you stop there a moment, Mr. Moore? A. Yes. Q. You said 6½ on both regular and ethyl on this transaction; did you mean that? A. No, I meant 6 cents on the regular and 6½ cents on ethyl. Q. All right. A. And that was to be a five-year contract. I told Mr. Martin I would take the deal, and Mr. Martin said, 'Well,' he said, 'I am sorry, but the price of diesel now is 10 cents'; and I said to Mr. Martin, I says, 'What are you doing, trying to find out how much I can pay for the gasoline and still operate?' I said, 'When you know what you want to sell me the gas and diesel for, come down to the station and let me know, because I want to buy it, but quit horsing around like this, because I am desperate for gasoline.' "

As things then stood, Union had rejected Moore's offer to buy gasoline on a basis of a 6½ and 7-cent discount, with a 10-cent price for diesel. In view of Moore's frustrating experience during the long negotiations, the jury could also well find that Martin's concluding price quotation was not an authorized, firm counter-offer, and that Moore was therefore justified in disregarding it. Assuming such a finding, it was then definitely Union's next move if it was to escape the charge of refusing to deal.

Whether Union would have initiated further negotiations with Moore can not be known. Before it had much of an opportunity to do so, Moore had his

attorney prepare a letter to Union, dated August 11, 1952, and mailed the next day, offering to purchase from that company all of his supply of gasoline, approximating a specified gallonage a month. He expressed a willingness to purchase at Union's regular prices for similar truck stations in the area. This letter was identical with letters which Moore, on that day, sent to all appellants.

Moore might have established his position more positively by ordering a tank wagon of gasoline at Union's prevailing price. The jury, however, was entitled to find that this letter constituted an offer to buy, the disregarding of which would constitute a refusal to deal. But Union did not disregard Moore's letter. In a reply, dated August 15, 1952, and received by Moore on August 18 or 19, Union said: "We acknowledge and thank you for your letter of August 11, 1952, and advise that our representative will call to see you at an early date."

Since this letter failed to indicate acceptance of Moore's offer, or to present a counteroffer, it was not itself sufficient to avoid the thrust of Moore's offer. But, within the next day or so, Martin went to Moore's station. According to Mrs. Moore, only she and a Frank Wilburn were there at the time. She testified that Martin told her he wanted to talk to her husband about a letter he had received. Mrs. Moore told Martin that her husband had gone out for a moment, and that Martin was welcome to wait. She then excused herself and went out to talk to some former customers. Martin waited not over ten minutes, and then departed, not having seen Moore.

Shortly thereafter, Moore returned to the station. Mrs. Moore told him that Martin had been there. Moore asked her if Martin had said anything about selling gasoline. The testimony does not reveal what

reply Mrs. Moore made to this inquiry. Moore then asked his wife whether Martin was going to call back. Mrs. Moore replied that Martin did not say. Moore then observed to his wife, "I guess if he wants to get in touch with me, he will call me." However, neither Martin nor any other representative of Union thereafter made an effort to contact Moore.

Moore testified that his wife had told him that Martin had been to the station and had asked to see Moore. Moore made no effort thereafter to contact Martin or any other representative of Union. When asked why he had not called Martin upon learning of the latter's visit to his station, Moore testified:

> "A. All right. The reason I didn't call Mr. Martin was that if he had been willing to sell me gasoline and get a good account like that, he would have been down there waiting for me and I would have been ready to buy. I was ready to buy."

Arnold Johnson, a laborer who was in the employ of Moore from December, 1947, to August, 1952, testified concerning a conversation with Martin at the station shortly before the 20th or 21st of August, 1952. At that time, according to Johnson, the station was not in operation, and United Truck Lines was using some of the pumps for its own purposes. On this occasion, United Truck Lines, according to Johnson, was unloading a tanker of gasoline. Johnson asked Martin, no one else being present, if he had come down "to sell us gasoline." It is Johnson's testimony that Martin replied: "No, I come [sic] down to see if United Truck Lines was using this fuel for their own purpose."

This testimony was at variance with Johnson's

testimony, in a deposition, that he had not talked to Martin, other than to say "good morning." It is also in conflict with Mrs. Moore's testimony that no person other than Frank Wilburn was present when Martin called.

If Johnson's testimony is to be given full credence, Martin's last call at the station had nothing to do with the sale of petroleum products. Since Union made no other contract with Moore, the finding would justifiably follow that Union had failed to act affirmatively upon Moore's offer to buy at Union's going prices for such a station. This would spell out refusal to deal.

But, in view of the disparity between Johnson's testimony at the trial, on the one hand, and his deposition and Mrs. Moore's testimony, on the other, perhaps the jury could not reasonably have found that Martin's last visit was unconnected with Moore's letter. Proceeding on this assumption, and bearing in mind that it was Union's next move, the question then presented is whether Martin made a reasonable effort to contact Moore. If Martin, on this occasion, did all that was reasonably required of Union to find Moore, for the purpose of consummating a sale of gasoline, there was no refusal to deal.

In our view, the jury could properly find that something more was required of Union at this date than Martin's ten-minute and somewhat enigmatic call at a time when Moore was not at his station. A little longer wait at the service station, a telephone call, or a letter stating the basis on which Union would sell gasoline, would have been sufficient. Without anything of this kind, the jury was free to infer that, if Martin really went to the station to discuss the letter, it was to say "no." Union finally

said "no," the jury could thus conclude, by discontinuing contact while in possession of Moore's written offer.

It is therefore our conclusion that the evidence was legally sufficient to support the jury finding that Moore was unable to obtain a supply of gasoline from Union.

General's Asserted Refusal to Deal. Again viewing the record in the light most favorable to the verdict, we turn to an examination of the evidence bearing upon General's asserted refusal to deal with Moore.

Arguing that the evidence is legally insufficient in this respect, appellants contend that it is uncontroverted that (1) after Tide Water ceased supplying Moore, General offered to supply him with gasoline at General's current tank wagon price; (2) this price was the current market price at which General was then selling or offering to sell gasoline to other service stations of like size and character; and (3) General's offer was refused by Moore.

Before considering what transpired between Moore and General after Tide Water ceased deliveries, it will be well to review the evidence favorable to Moore concerning their prior negotiations. In September or October, 1951, Moore telephoned to a Mr. Elmore, who was a branch manager for General. Elmore went to Moore's station the next day. Moore advised Elmore that the Tide Water contract could be terminated. Elmore indicated great interest in taking the account, stating that General needed representation in that area. "This is a chance that comes to a branch manager once in a lifetime," he told Moore. Elmore told Moore, however, that it was not in General's policy or program to take the account at that time.

In October, November, or December, 1951, a Mr. Falkner, representing General, went to Moore's station. Falkner tried to interest Moore in leasing a station from General on Boren Avenue, in Seattle. Moore looked over the Boren Avenue station and then told Falkner he would take it if he could get a supply of gasoline for his Fourth Avenue South station. A week later, Falkner told Moore that General would not supply his Fourth Avenue South station. This concluded Moore's negotiations with General at that time.

Moore's supply contract with Tide Water terminated at the end of July, 1952. On the afternoon of August 11, 1952, Moore, in company with one of his employees, called at the Seattle offices of several of the appellants, including General. At General's office, he talked with Mr. Elmore. Moore stated that he was running out of gasoline, and offered to buy gasoline for cash. He said nothing about prices on that occasion, and did not ask for a supply contract or a commitment for a permanent supply. Elmore told Moore on this occasion that General was short of gasoline and could not sell any to Moore.

Later the same day, Moore sent a letter to General, similar to the letter sent on that day to Union and other appellants, offering to purchase all of his gasoline from General at the latter's "regular" price. General made no written response. Within two or three days, however, Elmore telephoned to Moore. According to Moore, Elmore asked if Moore would pay "tank wagon price" for gasoline.[11] Moore's response was that a station like his could

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[11] Moore gave this version of how the telephone conversation began:

". . . He asked me if I was completely out of gasoline. And I told him I was. He asked me if I had gone to all the companies to try to get gasoline, and I told him that I had, and he said that he didn't like that; that it was a black eye to the industry. . . ."

not operate on tank wagon prices, but that he was willing to pay the price which a station similar to his would pay. According to Moore's testimony, Elmore then said that he would see what he could do for Moore about getting gasoline. Moore heard nothing more from Elmore or any other representative of General.

Albert E. Horn, Jr., General's division manager for Washington, testified that, on August 11, 1952, he authorized the supplying of Moore on a temporary basis at tank wagon prices. He further testified that he instructed Elmore to tell Moore that General would sell him gasoline for his service station on a day-to-day basis at General's posted tank wagon price until Moore could arrange for a supply elsewhere. According to Horn, Elmore later reported that these instructions had been carried out. Elmore did not testify.

The jury was entitled to believe Moore's version of what Elmore told him, and to reject the inference arising from Horn's testimony, that Elmore told him something else. If the jury accepted Moore's testimony in this regard, it could have found that General did not accept Moore's offer to buy gasoline, and did not make a counteroffer to sell gasoline to Moore. A seller's inquiry of a prospective buyer as to whether the latter would buy at an indicated price is not necessarily an offer to sell at that price.

Ordinarily, failure to accept, within a reasonable time, an offer to buy, or to make a counteroffer to sell, indicates refusal to deal. This is not always true, however, as the surrounding circumstances may cast such failure in a different light. Thus, if a buyer indicates to the seller in advance that he would not buy at the seller's current prices for simi-

lar sales, the seller's failure to offer goods at that price does not evidence a refusal to deal.

Appellants argue, in effect, that the uncontroverted evidence shows that this is what happened here. Thus produced testimony to the effect that General was in short supply, and was therefore, at the time in question, operating under a sales policy which precluded the taking on of new accounts at less than tank wagon prices.[12] Moore testified that he told Elmore that he could not operate on that price.

Moore testified further, however, that when he told this to Elmore, the latter stated that he would see what he could do. The jury could infer from this that General's price policy was not as inflexible as appellants' testimony would tend to indicate. If such prices were not inflexible, then Moore, with his high-gallonage station in a location which Elmore had said was favorable, would be entitled to a discount such as General had previously given other stations, or so the jury could have found.

The jury could also have found that Moore was led to believe, by Elmore's closing remarks during their telephone conversation, that there would be further price negotiations. The jury was warranted in reasoning that, if Moore had been advised that General would, in no event, offer better than tank wagon prices, he might have accepted gasoline on such a basis for purposes of a temporary supply. But there were no further price negotiations, and

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[12] Moore, of course, strenuously disputes General's position concerning its 1952 shortages and resulting restriction upon the taking of new accounts. The sufficiency of the evidence to support a jury finding in Moore's favor on this point is not relevant to our present inquiry, which concerns refusal to deal regardless of reasons. The reasons for refusal, however, do become relevant on the question of the sufficiency of the evidence to support the jury finding of unlawful agreement, combination, or conspiracy. To avoid the necessity of again discussing this factual situation when we come to a discussion of the latter point, we state now that, in our opinion, the matter of General's 1952 gasoline shortages was sufficiently in dispute to present a jury question.

Moore was never told that General would not offer a lower price. Viewed in this light, the jury was warranted in finding that Moore's offer to buy had, in effect, been rejected, and that no bona fide counteroffer had been made. This is enough to support the ultimate finding that General refused to deal with Moore.

We therefore conclude that the evidence was legally sufficient to support the jury finding that Moore was unable to obtain a supply of petroleum products which would permit him to remain in business.

IV

PROOF OF AGREEMENT, COMBINATION, OR CONSPIRACY

This brings us to the question of whether the evidence was legally sufficient to support a jury finding that Moore's inability to obtain gasoline resulted from an agreement, combination, or conspiracy among the appellants in restraint of, or to monopolize, interstate trade or commerce.

Appellants do not question the sufficiency of the evidence as to the interstate character of the trade or commerce in question.[13] They do, however, contend that the evidence is not legally sufficient to support a jury finding that Moore was refused a supply pursuant to, or in furtherance of, an unlawful agreement, combination, or conspiracy of the kind indicated.

As foreshadowed by the pleadings, the agreement, combination, or conspiracy which Moore

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[13] In any event, the evidence was sufficient to support a jury finding that interstate trade and commerce was involved. See Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231.

sought to prove was broad in scope. Its total objective, according to Moore, was no less than effective control and regulation of gasoline prices, and the monopoliation, domination, and channelization of gasoline distribution in the Seattle area.

In proof of an arrangement between appellants having this breadth of purpose and complexity of design, evidence was submitted concerning a wide variety of asserted supply, marketing, and pricing practices. Included among these were practices relating to the discontinuance of split-pump accounts,[14] public posting of wholesale, or so-called "tank wagon" prices, granting of discounts from posted prices, withdrawal of discounts and allowances, exchange of price information, exchange of petroleum products between appellants, resale price directive, consignment sales, the so-called "clearance" program,[15] suppression of curb signs, and refusal to sell to price cutters.

An examination of the voluminous record of testimony and exhibits[16] brings us to the view that the evidence does not provide substantial support for a jury finding that all or any of the appellants entered into and carried out an agreement, combination, or conspiracy having the magnitude and ramifications pictured in the complaint.

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[14] A "split-pump" account is one in which the service station operator is permitted to sell the gasoline of two or more oil companies.

[15] Where a service station operator desired to change from one oil company to the other, the latter company's inquiry of the former as to whether the operator was contractually free to deal with the new company was called a request for "clearance."

[16] The trial lasted over three months. There were 72 witnesses, whose testimony required 20 volumes of printed record comprising 7,701 pages. There are 1,088 exhibits. According to the clerk of the district court, the record is the longest in any civil case ever appealed to this court from the Western District of Washington. It required more trial days than four of the five big antitrust cases brought by the United States in 1949 (13 F.R.D. 64). Including exhibits, the record compares in size with the government's famous Standard Oil case in 1911, which involved every phase of virtually the entire petroleum industry of the United States. Standard Oil Co. v. United States, 221 U. S. 1. One and a half days were allotted for oral argument before this court.

Were this view concerning the sufficiency of the evidence dispositive of the appeal, it would be necessary to here set forth, at least in summary form, a resume of the evidence and our analysis of its deficiencies.

Failure to establish, prima facie, the broadly-alleged agreement, combination, or conspiracy does not, however, compel the conclusion that Moore did not make out a case. Concerted refusal to deal is the particular act or practice which is claimed to have damaged Moore. If there is substantial evidence to support a finding that for any reason touching the matter of prices or competition appellants agreed, combined, or conspired to deny gasoline to Moore, or to a class of dealers of which he was a member, and that Moore was damaged by a resulting act or practice of that kind, the verdict withstands appellants' factual challenge.

The trend of the evidence favorable to Moore suggests the nature of the limited agreement, combination, or conspiracy of this kind which the jury may have found to exist. It would be an agreement, combination, or conspiracy to control price cutting and curb-sign advertising by refusing gasoline to dealers whose severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers.

There is substantial evidence that Moore was in this class of dealers. He was not content to hold his price-cutting practices within the limits generally adhered to by other price cutters. During a so-called "price war" in the spring of 1951, the other dealers dropped their prices from 27 cents a gallon for regular gasoline to 24.9 cents. Moore, however, first lowered his price to 24 cents, and later to 22.9 cents, both times over the strenuous objections of his sup-

plier, Tide Water. Nor did he, for a considerable time, heed Tide Water's insistent request that his curb price signs, advertising this low price, be removed.

Moore finally agreed to remove the curb signs, and did so in August, 1951, in consideration of Tide Water agreement to release him from his contract so that he could obtain a supply elsewhere. Moore did not sign the termination papers which were later submitted, however, since Tide Water promised him only a ten-day supply of gasoline. Business relations between Moore and Tide Water deteriorated rapidly from this time on. A half cent of his 2½ cent a gallon discount on gasoline was taken away, and restored only after Moore's attorney negotiated with Tide Water. Moore was put on a C. O. D. basis, and later his Tide Water distributorship on batteries and tires was taken away. In November and December, 1951, according to Moore, Tide Water began delivering poor ethyl gasoline, and continued this for four months.

In resisting Tide Water's asserted pressure on him, Moore stopped payment on certain checks (paying them shortly afterwards), and, on occasion, paid for gasoline with small change. On two occasions, he ordered Tide Water employees off his premises.[17] Finally, on May 2, 1952, Tide Water served upon Moore a notice that his contract was being canceled effective June 30, 1952. As before stated, Tide Water's supply to Moore ended on the latter date.

There is also substantial evidence that the other appellants refused to deal with Moore after his con-

[17] After 1947, Moore had refused to give Tide Water a financial statement. Moore testified that he refused to give Tide Water such statements because it would jeopardize his bargaining position when it came time to renew his contract if Tide Water knew how well he had been doing.

troversy arose between him and Tide Water. This point has been fully discussed in a preceding section of this opinion.

The crucial inquiry, then, is whether there is substantial evidence to support a finding that these other appellants denied service to Moore pursuant to an agreement, combination, or conspiracy of the kind alleged, rather than as a result of a legitimate business decision, independently arrived at, unassociated with any such mutual arrangement or deliberate concert of action.

Each such appellant (except Union and General, which deny that they refused to deal) asserts that its individual refusal to deal with Moore, following the development of his controversy with Tide Water, was the result of a legitimate, independent business decision. The principal reasons advanced by individual appellants as to why they were unable to do business with Moore are that the company had a limited supply, which made it impracticable to take on new accounts, or that the company already had a retail outlet very close to Moore's station.

On the other hand, evidence favorable to Moore, and reasonable inferences which could be drawn therefrom, present a somewhat different picture.

Standard refused to do business with Moore in August, 1952, asserting that its supply position was critical. Considering the record as a whole, however, the jury was not required to accept this explanation. Moreover, there is evidence to indicate that in the previous year, after Moore's controversy with Tide Water arose, and at a time when Standard had no supply problem, it refused to deal with Moore because "it isn't our policy to take you." This decision was made after a period of negotiation, during which the parties seemed to reach agreement on

prices. During the early part of these negotiations, the Standard representative had appeared anxious to take on Moore's account.

Union did not claim lack of gasoline or presence of an adjacent Union station as a reason for not dealing with Moore. Indeed, the position of that appellant is that it was willing to deal. Yet, the evidence reviewed in a preceding section of this opinion indicates that Union several times rejected Moore's offer, and never quite got around to making a firm counteroffer. This in spite of the fact that representatives of Union who called upon Moore seemed to want his account.

General, like Union, claims that it was willing to deal with Moore after Tide Water discontinued, and asserts that Moore rejected its offer to sell at its prevailing market price. In a preceding section of this opinion, however, we have referred to evidence from which the jury could have concluded that Moore's written offer to buy at General's regular prices, communicated to General on August 12 or 13, 1952, was not acted upon. On August 11, 1952, General had orally refused to deal, asserting, as a reason, short supply of gasoline. Yet, as in the case of Standard, the evidence was such that the jury was not required to credit this assertion.

In the previous September or October, after Moore's controversy with Tide Water arose, his attempt then to obtain gasoline from General was likewise futile. The company representative who then negotiated with Moore had appeared elated to have the opportunity of taking his account, but wound up by telling Moore it was not in General's policy or program to do so. General's policy or program appeared not to stand in the way of leasing a Boren Avenue station to Moore, but only to deliv-

ering gasoline to the Fourth Avenue Station where he had had difficulty with Tide Water.

In June or July, 1952, a Richfield representative, answering Moore's request to open negotiations, gave several reasons why it would be to Moore's advantage to deal with Richfield. He was told that, while Moore's contract with Tide Water was a "longer deal" than Richfield was accustomed to, it was believed the Tide Water price could be matched. Moore was also told that it would make no difference that Richfield then had a station across the street. Richfield's Los Angeles office, however, rejected Moore's business for the asserted reasons that he was a price cutter and his discount practices would be "upsetting" to other Richfield accounts. Moore was not given this reason, but was told only that the deal was off.[18]

Moore made no attempt to purchase gasoline from Shell until 2:30 p.m., on August 11, 1952. This was twelve days after his Tide Water source had been terminated. On this occasion, Moore was told that Shell would not sell gasoline to him because there was a service station across the street. The representative who told this to Moore, however, stated that Shell would have solicited Moore's business had not Tide Water told Shell that Tide Water owned the 10,000-gallon tank on Moore's premises. This

[18] Richfield, Union, and, to some extent, Tide Water had fair trade clauses in their respective contracts with retail dealers. Under the 1937 Miller-Tydings amendment of the Sherman Act (15 U.S.C.A. § 1), and under chapter 19.88 of the Revised Code of Washington, a manufacturer may fix the minimum resale price of a trade-marked article. The practice is called "fair trading." Except for the period between the decision in Schwegmann Bros. v. Calvert Distilleries Corp., 341 U. S. 384, on May 21, 1951, and the enactment of the McGuire Act on July 14, 1952 (66 Stat. 631, 632; 15 U.S.C.A. § 45), this minimum price is and was binding on dealers whether or not they signed an agreement to observe it. There may be circumstances, however, under which such agreements are illegal because of the existence of competition between the supplier and the retail dealer it supplies, for the business of certain ultimate consumers, (see Esso Standard Oil Co., v. Secatore's Inc., (1 Cir.) 246 F. (2d) 17, cert. den., 78 U. S. 54, October 14, 1957) or for other reasons. See Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, 152-153.

tank actually belonged to Moore. Replying to Moore's letter of August 11, 1952, offering to buy all of his gasoline from Shell, the company gave two reasons for refusing his business. One of these was that it would be a violation of antitrust laws to enter into an exclusive dealership arrangement. The second reason was that Shell products were then being marketed at the nearby Flajole Bros. Shell station.

Moore made no effort to purchase gasoline from Texas until August 11, 1952. On the afternoon of that day, he went to the Texas office in Seattle and offered to buy gasoline for cash. He was denied a supply, on the ground that Texas had a company-owned station two blocks down the street. The company representative told Moore: "The Texas Company has lots of gasoline and is actively soliciting business but you are too close to us and we won't sell you." The same position was taken in that company's reply to Moore's letter of August 11, 1952.

The refusal of all of these appellants to deal with Moore, after the disagreement arose between him and Tide Water, was prophetic fulfillment of statements made to him by Tide Water representatives. While they were trying to bring him into line on prices and use of curb signs, officials of that company told him, "We can break a service station operator like you if you don't do what you are told on these price signs"; "If you don't take the price sign down, when I get through with you no company in town will sell you gas"; "You are being foolish to get the companies mad at you like this for not taking the price sign down." This sort of threat could well lead the jury to infer that Tide Water felt assured that its pressure on Moore would find support from the other appellants.

Moore was not alone in finding that severe price-cutting practices seemed to close the gates to all sources of supply.[19] Extensive evidence was presented concerning the difficulties experienced by seven aggressive price cutters in obtaining a supply of gasoline. The two instances of this kind most favorable to Moore involved a "Gasoteria" operation by one John Brady, and a General dealer named Victor W. Markov.

All appellants except Shell (but including Shell's predecessor) either rejected in writing Brady's offer to buy gasoline, or failed to respond to his offer. In making this solicitation, Brady had advised each of these companies that he operated a self-service "Gasoteria" station, and that it was his policy to sell gasoline at a discount of three or four cents a gallon off the general retail price. When this solicitation was made, his current source of supply, Clipper Oil Company (which then obtained its gasoline from Texas), had been cut off, due to a controversy which had nothing to do with prices. This quarrel with Clipper was soon settled, and Brady resumed operations. Between 1949 and 1952, Brady endeavored to obtain his gasoline from Texas, General, and Standard, but without success. In 1952, however, he did obtain a substantial amount of gasoline from Signal Oil Company. Signal was then an operating division of Standard.

Markov got into difficulties with his then supplier, General, during the 1951 "price war," when he dropped his prices and thereby substantially increased his sales. General tried to get Markov to

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[19] The evidence favorable to Moore would not support a finding that it was the general practice of appellants to deny petroleum products to all price-cutting service stations. In the Seattle area, there have always been price-cutting service stations supplied by appellants. Moore, who was himself a price cutter for thirteen years, was supplied by Tide Water until July 30, 1952. Tide Water at all times knew of Moore's price-cutting activities.

raise his prices, but he refused. General then discontinued sales to Markov, but leased his station and continued to deliver gasoline on a consignment basis. This required Markov to sell at prices fixed by General. When Markov demanded permission to lower his prices, General canceled his consignment contract. It then raised his wholesale price to the tank wagon level. Sales continued on this basis to the time of the trial.

In September, 1952, Markov, who then had a reputation as a price cutter, attempted to obtain gasoline from each of the other appellants except Tide Water. Standard turned him down on the ground that it was experiencing a shortage of supply. Shell and Union advised Markov that they were not interested because they were selling to other service stations in the vicinity.[20] Texas told Markov that it was not interested in taking on new business. Richfield declined to sell to Markov because of its "fair trading" policy.

There is in the record other evidence tending to indicate concert of action among appellants in suppressing curb price signs. In the case of General, there was testimony that the action of Markov in displaying price signs was reported by Union, Richfield, and General employees to their respective Los Angeles offices.

A former Richfield employee testified that he was under instructions to report to his office when signs were displayed at the service stations of other dealers. When he reported the presence of such signs displayed by competitive dealers, "the signs usually came down."

Moore, who was a Tide Water dealer, testified

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[20] When Markov first commenced business in November, 1949, however, Shell attempted to obtain his account despite the existence of its adjacent station.

that a salesman for Texas, in urging Moore to take down his price sign, stated: "It is in the program to get the price signs down on the Avenue and clean up the Avenue." Moore also testified that, during a 1950 "price war," a representative of his supplier, Tide Water, told him that the company would not sell Moore any more gasoline until he took his price sign down. A Shell station across the street was also displaying such a sign at that time. The Tide Water representative told Moore, "I will have that sign down in five minutes from the time yours is down." Moore took his sign down. The Tide Water man then went to a telephone and made some calls. The Shell sign came down within five minutes.

A retail dealer of Chevron (Standard) products was told by a Standard salesman that if he took his sign down, the signs of other dealers "would be down as soon as possible." This dealer testified that stations in his area representing three or four major oil companies took their signs down about the same time that he did. Some of the exhibits show that Seattle representatives of Tide Water made surveys of the price sign situation in Seattle, determining the name, address, and oil company represented, for use by its San Francisco office.

The foregoing resume deals with what we regard as the most significant evidence favorable to Moore bearing directly upon appellants' apparent unanimity of action and possible contact with each other concerning severe price cutters and persistent displayers of curb price signs. There is a great deal of additional evidence, however, tending to show parallel action by appellants, or actual contacts and communications between them, concerning other supply, storage, marketing, and pricing practices. The significance of evidence of this kind lies in its

tendency to picture a business setting and relationship which invites inferences favorable to Moore's position.

Among the matters dealt with in the evidence of this character are (1) the apparently concurrent and uniform act of all appellants, in 1936 (excluding Shell but including its predecessor) in discontinuing "split-pump" accounts in the Seattle area, and requiring each retail dealer to obtain his supply exclusively from one oil company;[21] (2) the practice of all appellants in posting their respective tank wagon prices in conspicuous public places, with the resulting tendency towards uniformity as to the wholesale prices of all appellants;[22] (3) the uniform practice of all appellants in allowing unpublished discounts from the posted prices to selected dealers; (4) the practice of all appellants in exchanging petroleum products with each other to meet special supply or storage problems as they developed; and (5) the uniform practice of all appellants whereby they would not undertake to serve a retail dealer already in business without contacting his present supplier and obtaining "clearance."

The summary of the evidence, as set out in this section of the opinion, is necessarily fragmentary, as compared to the bulk of the entire record. Moore will be able to point to items of evidence in his favor which have not been mentioned. Appellants will be

[21] In attempting to prove the existence of a combination or conspiracy during a particular span of years, it is permissible to show the relationship existing and practices followed during earlier years. American Tobacco Co. v. United States, 328 U. S. 781, 790.

[22] In achieving this uniformity, an appellant whose prices were high would frequently lower its prices to accord with the posted price schedule of other appellants. But with respect to at least one appellant (Texas), "meeting competition" meant not only lowering prices to parallel a lower price posted by others, but also the raising of prices to produce such uniformity. In the case of Richfield, Texas, and Union, supervising officers sometimes requested local representatives to check the posted price schedule of competition. As to each such company, local representatives were also occasionally advised of information gained by the supervising office as a result of its own check of posted price schedules.

able to show that a more complete review of the evidence here adverted to would suggest weaknesses in Moore's case not apparent from a reading of this opinion. Our purpose has been only to indicate, in a general way, the lines of evidence which have a tendency to lead in the direction of the jury verdict.

This evidence, of course, is largely circumstantial. The fact that the evidence is circumstantial, however, does not necessarily affect its sufficiency to support a finding of agreement, combination, or conspiracy. Such arrangements, as the Supreme Court has said, "are seldom capable of proof by direct testimony, and may be inferred from the things actually done. . . ." Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 611, 612.[23]

That the evidence tending to prove a fact is wholly circumstantial is not ground for setting aside a finding of such fact unless, as a matter of law, reasonable minds, as triers of fact, must be in agreement that some reasonable hypothesis other than the existence of such fact could be drawn from the evidence. Elwert v. United States (9 Cir.), 231 F. (2d) 928, 935. In applying this test, the evidence is to be viewed as a whole and not link by link. C-O-Two Fire Equipment Co. v. United States (9 Cir.), 197 F. (2d) 489, 494, cert. den., 344 U.S. 892.

Where the circumstantial evidence favorable to the verdict meets this test, an appellate court will not "search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 35.

A considerable part of the evidence reviewed

[23] See, also, Interstate Circuit v. United States, 306 U. S. 208, 221; Flintkote Co. v. Lysfjord (9 Cir.), 246 F. (2d) 368, cert. den. ..... U. S. ....., October 14, 1957.

above concerned the acts of individual appellants and of their agents or employees, and the extrajudicial declarations of such agents or employees. In evaluating evidence of this kind, it must be kept in mind that evidence of such acts and extrajudicial declarations are not to be considered as against other alleged members, unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy. Glasser v. United States, 315 U.S. 60, 74-75.[24]

Part of the evidence, as previously noted, concerned asserted instances of parallel action knowingly taken, rather than actual contacts and communications between appellants. Consciously parallel business behavior in matters touching prices and competition does not itself constitute a Sherman Act offense. It is, however, admissible circumstantial evidence of an underlying agreement, combination, or conspiracy concerning such matters. The probative value of such evidence is to be determined by the trier of the facts. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-541.[25]

A merchant is ordinarily entitled to develop business relationships with whom he pleases. United States v. Colgate Co., 250 U.S. 300. Accordingly, the act of an individual person or company in refusing to deal with another usually does not, standing alone, have antitrust significance. There are some exceptions to what has just been said, as noted in the Report of the Attorney General's National Com-

[24] This rule does not deal with the testimony of members of such an arrangement, or of their agents and employees, but only with independent evidence of facts and extrajudicial declarations. Where such a member, agent, or employee does testify, independent evidence of acts and extrajudicial declarations is admissible for purposes of contradiction. See 2 Restatement, Agency, 642, § 285, comment a.

[25] See, also, Report of the Attorney General's National Committee, supra, 36-40.

mittee, supra, 134-136. We need not determine whether the record contains a factual basis for applying any of these exceptions against Tide Water or any other appellant. This is true, because the theory of this action, as set out in the pleadings and unchallenged instructions, and as argued to the jury, does not admit of a verdict based upon individual refusal to deal. The only injury for which Moore sought damages was that said to have resulted from an unlawful agreement, combination, or conspiracy.[26]

Where an act or practice of refusing to deal is shown to be pursuant to, or in furtherance of, an agreement, combination, or conspiracy, Sherman Act liability is encountered. It is now well established, and is not here questioned, that an agreement, combination, or conspiracy between two or more persons engaged in interstate commerce, to withdraw or withhold custom from another, or with a class of others, is violative of the antitrust laws.[27] Concerted restraint of this kind is illegal, even if intended to meet or overcome an admittedly invidious trade practice.[28]

Evidence tending to show that there was a legitimate business reason for the act of an individual merchant in refusing to deal is always admissible in contradiction of a case built upon circumstantial evidence. But, if there is sufficient evidence to support a finding that a merchant entered into such an

[26] For the same reasons, the verdict is not sustainable as against Tide Water on the theory (which may or may not have factual support in the record) that Tide Water participated in an agreement, combination, or conspiracy with other service station operators who were in competition with Moore.

[27] Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211; Associated Press v. United States, 326 U. S. 1; United States v. Frankfort Distilleries, Inc., 324 U. S. 293; Millinery Creators' Guild, Inc. v. Federal Trade Commission, 312 U. S. 469; Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457.

[28] Fashion Originators' Guild v. Federal Trade Commission, supra; Report of the Attorney General's National Committee, supra, 133.

agreement, combination, or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability. He will be deemed to have set in motion an illegal undertaking, and will be held accountable for damage caused by the overt act of any member, pursuant to or in furtherance of the plan.

This is but an application of the general law of conspiracy. See Marron v. United States (9 Cir.), 8 F. (2d) 251, 258. It is based upon the principle that a conspiracy creates an agency relationship, and that therefore each member is authorized by the other members to perform acts in furtherance of the common objectives. Las Vegas Merchant Plumbers' Ass'n v. United States (9 Cir.), 210 F. (2d) 732, cert. denied, 348 U.S. 817.

No express agreement, of course, is necessary to constitute an unlawful combination or conspiracy. American Tobacco Co. v United States, 238 U.S. 781, 809. It is sufficient if persons, with knowledge that concerted action was contemplated and invited, "give adherence to and then participate in a scheme." Federal Trade Commission v. Cement Institute, 333 U.S. 683, 716.

Viewing this evidence, as we are required to, in the light most favorable to Moore, and having in mind the applicable rules and principles to which reference has been made, we hold that the jury finding of agreement, combination, or conspiracy, and resulting overt act, is supportable as against all appellants.

As to all appellants, the evidence is sufficient to support a jury finding of agreement, combination, or conspiracy to control price cutting and curb-sign advertising by refusing gasoline to dealers whose

severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers. The evidence is sufficient to support a jury finding that, in 1951 and 1952, Moore became such a dealer, and that, pursuant to and in furtherance of the agreement, combination, or conspiracy, the appellants withheld their custom.

V

ADMISSIBILITY OF EXHIBITS RECEIVED IN PROOF OF AGREEMENT, COMBINATION, OR CONSPIRACY

Hundreds of exhibits were offered and received in evidence in proof of the alleged unlawful agreement, combination, or conspiracy. Most of these consist of photostatic copies of documents found in the Seattle and California files and records of appellants. These documents had been made available in response to orders to produce. They consist largely of the originals or copies of letters, telegrams, memoranda, and reports. Some were hand-written, some were typewritten, and others were mimeographed or printed.

It is not questioned on this appeal that the photostatic copies are accurate reproductions of the documents in question, or that the documents came from appellants' files and records. Appellants objected to the introduction of most of these exhibits, however, on the ground, among others, that they constitute hearsay, and that no foundation had been laid for their admission under any exception to the hearsay rule.

In nearly every instance where such an objection was made, it was overruled and the exhibit was admitted in evidence. The trial court held that exhibits of this kind which were received in evidence

were admissible under the exception to the hearsay rule which applies to business records.[29] In the federal courts, this exception is sanctioned by statute.[30]

Appellants argue that the admission of these exhibits on this ground and over appellants' objection constituted prejudicial error. While several hundred exhibits of this kind are said to have been improperly admitted, our attention is specifically directed to 119 such exhibits. In their specifications of error, appellants provide detailed references and arguments as to 46 of these exhibits, contending that they exemplified both the impropriety of what was done and the prejudice which resulted. Six exhibits or series of exhibits, selected for illustrative purposes, are dealt with at length in the briefs.

Most of the memoranda, letters, and telegrams introduced in evidence in this fashion consisted of interoffice communications between officials of the same company. Many of these communications dealt with such matters as the marketing and pricing policies and activities of the company, of other oil companies, or of customer or competing service station operators. Others dealt with problems of supply, plant and service station facilities, or competition. Some of the communications provided factual

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[29] As apparently recognized by all concerned, most of these exhibits constituted hearsay, since substantially all of them were offered to prove the truth of the contents, and were not subject to the test of cross-examination. See Palmer v. Hoffman, 318 U. S. 109, 112; 5 Wigmore, Evidence (3d ed., 1940) 3, 376, §§ 1367, 1530.

[30] 28 U.S.C.A. § 1732, subd. (a) of which reads as follows:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

information. Others contained expressions of opinion, suggestions, instructions, or requests for information.

In addition to these interoffice communications, there were many memoranda from salesmen or other field representatives to their superiors. These memoranda were largely used to report the observations of the writer, or information supplied by others, concerning the marketing and pricing policies and practices of other oil companies and of customer or competing service station operators. These field memoranda were sometimes handwritten on printed memo forms supplied for the purpose.

A number of the exhibits were reproductions of weekly reports or surveys of highest, lowest, and average prices posted at retail outlets in specified areas.

Admissibility as Business Records. To be admissible under 28 U.S.C.A. § 1732, the writing must have been made "as a memorandum or record" or some "act, transaction, occurrence, or event." The memorandum or record must have been made in the "regular course" of the business. It must also have been in the regular course of such business to make the memorandum or record "at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter."

The probability of trustworthiness of memoranda and records made and maintained as provided in § 1732 lies in the fact that they are routine reflections of the day-to-day operations of the business in whose files the memoranda and reports are found. Palmer v. Hoffman, supra, pages 113-114. The matters which reflect the day-to-day operations of a commercial enterprise are those in which it is directly concerned as a participant. Illustrative of

these are such matters as bids, offers, purchases, sales, deliveries, price quotations, credit extensions, loans, rentals, salary and wage payments and deductions, inventory changes, and bank deposits.

It follows that a writing which does not pertain to a matter in which the business was a direct participant, but to some incident, circumstance, or activity outside that business, is not a memorandum or record of an "act, transaction, occurrence, or event" within the meaning of the statute. In this event, the writing is not admissible under § 1732, notwithstanding it may have been made in keeping with systematic and routine procedures, and concerns a matter of importance to the business. See Palmer v. Hoffman, supra; Clainos v. United States (D.C.Cir), 163 F. (2d) 593.

A great many of the exhibits in question consist of memoranda, letters, and reports dealing with the pricing and marketing policies of oil companies other than the one in whose files the writing was found. Other such exhibits deal with the like policies and practices of service station operators who were not customers of the company in whose files the writing was found. For the reasons just stated, such writings are not business records, and should not have been admitted under § 1732.

The considerations discussed above and the context of § 1732, read as a whole, also indicate that a writing cannot ordinarily be considered a "memorandum or record" or an "act, transaction, occurrence, or event," unless the recitals in such writing are factual in nature. There are special circumstances under which writings containing expressions of opinion or conclusions, as distinguished from factual statements, may be admissible under the statute. This may be done, however, only where

the subject matter is such that the expression of an opinion or conclusion calls for professional or scientific knowledge or skill, and where the opinion or conclusion is expressed by one having the required special competence and authorized to do so by the person or company maintaining the memorandum or record.[31]

A good many of the exhibits in question contain expressions of opinion, or conclusions, concerning the reason why another oil company or a noncustomer service station operator took, or failed to take, certain action, or concerning the probable course such companies or persons would follow in the future. Expressions of opinions or conclusions on such matters do not call for professional or scientific knowledge or skill. It follows that exhibits containing such recitals were not admissible under § 1732.

A memorandum or record cannot be considered as having been made in the "regular course" of business, within the meaning of § 1732, unless it was made by an authorized person, to record information known to him or supplied by another authorized person. The second paragraph of § 1732(a) expressly provides that the entrant or maker need not have personal knowledge of the matters recited in the memorandum or record. Wheeler v. United States (D.C.Cir.), 211 F. (2d) 19, 23, cert. denied 347 U.S. 1019. But where the entrant or maker records information supplied by others, it must appear that "it was part of their regular course of

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[31] See, for example, Medina v. Erickson (9 Cir.), 226 F. (2d) 475, 482, cert. denied 351 U. S. 912 (doctors' consultation reports, made in accordance with hospital regulations); Morgan v. Pittsburgh-Des Moines Steel Co. (3 Cir.), 183 F. (2d) 467, 473 (report of U. S. Bureau of Mines concerning explosion); Pekelis v. Transcontinental & Western Air (2 Cir.), 187 F. (2d) 122, cert. denied, 341 U. S. 951 (report of company accident investigation board). But see Chapman v. United States (5 Cir.), 194 F. (2d) 974, 978, cert. denied, 344 U. S. 821, criticizing the Pekelis and Moran decisions.

business to report to him what the declarants themselves knew, as it was part of his business to record what they said." United States v. Grayson (2 Cir.), 166 F. (2d) 863, 869.[32] Where the information comes to the entrant or maker from unauthorized persons, the memorandum or record is therefore inadmissible, not because it contains hearsay, but because it was not made in the regular course of business.

With regard to some, but not all, of these exhibits, there was evidence to indicate that the writing had been prepared in the course of the writer's duties as an employee of the company maintaining the record. In many of these exhibits, however, there is information which the writer attributed to others. This is particularly true with respect to memoranda from the field. In few, if any, of these instances was any showing made that the person supplying such information to the writer had the duty to do so. In most cases, the lack of such authority is self-evident, for the information was attributed to a service station operator or other person having no relationship with the company which could give rise to such a duty.[33] Exhibits falling in this category were not admissible under § 1732.

A memorandum or record cannot be considered as having been made in the "regular course" of busi-

[32] See, also, Gencarella v. Fyfe (1 Cir.), 171 F. (2d) 419; Clanios v. United States (D.C. Cir.), 163 F. (2d) 593. Contra: Pollack v. Metropolitan Life Ins. Co. (3 Cir.), 138 F. (2d) 123, 129; United States v. General Motors Corp. (7 Cir.), 121 F. (2d) 376, 409, cert. denied, 314 U. S. 618.

[33] Perhaps the most extreme example of this kind is plaintiff's exhibit 6-B. It is a report by an unidentified salesman named "Art" to Union's local manager, about a Tide Water dealer. Received as a business record of Union, it reads in part:

> "Mr. Chris Pieren, Associated dealer at 7120 East Marginal Way told me today that Associated has removed off policy discounts from their self-serve dealers and has discontinued selling to them unless they raise their posted price to the regular retail level.
>
> "Bill Scholdt, operator of Bill's Gas Well at 10300 East Marginal Way, said the Harris Petroleum had been approached by two Associated Self-Serve dealers formerly supplied by them for their further supply since Associated was going to take away their discount. . . ."

ness, within the meaning of § 1732, unless it was made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records.[34]

As before noted, it was established with regard to some, but not all, of these exhibits that the writing had been prepared in the course of the writer's duties as an employee of the company. On a good many of the papers, there were initials or other marks to indicate that the communication, after being transmitted, had come to the notice of one or more of the company's officials. In most instances, however, it was not established that the internal procedures of the company required that such writings be prepared, transmitted, and filed systematically, or as a matter of routine.

Concerning almost all of the items comprising the grist of interoffice memoranda and letters which were introduced, the nonexistence of any such company procedure seems almost self-evident. They were patently intended as communications between employees, and not as records of company activity. Many of them were casual and informal in nature, seeking or providing information of a kind which could be, and no doubt often was, communicated by telephone or in conference. Most of them were apparently written as a result of the exercise of individual judgment and discretion.

If there was any systematic or routine procedure

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[34] The existence of a document or its presence in the file of a corporation does not, without more, render it admissible under § 1732. National Labor Relations Bd. v. Sharples Chemicals, Inc. (6 Cir.), 209 F. (2d) 645. That the company procedures must provide for systematic or routine entry of such records, see Palmer v. Hoffman, supra; New York Life Ins. Co. v. Taylor (D.C. Cir.), 147 F. (2d) 297, 303; Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co. (2 Cir.), 18 F. (2d) 934; 5 Wigmore, Evidence (3d ed. 1940) 373, § 1525. The requirement that the procedure call for timely entry of such records is expressly spelled out in § 1732(a) in these words: ". . . and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

being followed in the preparation and filing of such writings, the burden was upon appellee to prove it. He failed to do so, at least with regard to most such exhibits. Where this foundation was lacking, the exhibit was not admissible under § 1732.[35]

With regard to few, if any, of these exhibits was there testimony indicating that it was a regularly established business procedure to make such memoranda or records at the time of the act, transaction, occurrence, or event therein described, or within a reasonable time thereafter. In numerous instances, the writings themselves reveal that they had not been prepared with any particular or general time limit in mind. Some of the documents contain references to acts which occurred or policies which were established a considerable time before the writing was prepared. Others do not refer to past acts and events at all, but contain predictions as to what would or should occur in the future. Exhibits unsupported by foundation evidence showing adherence to company procedures calling for prompt preparation of the writing were not admissible under § 1732.

In reaching the conclusions stated above, concerning the lack of adequate foundation to warrant the admission of these exhibits under § 1732, we have not overlooked the decisions relied upon by appellee. For the reasons stated below, we believe that they do not support appellee's position.

Southard v. United States (9 Cir.), 218 F. (2d) 943, involves § 1733, not § 1732. In Sheehan v. Mu-

[35] It is not suggested that the writings were inadmissible because they were in the form of memoranda or letters. It is expressly provided in § 1732 that writing which meet the requirements of that statute are admissible "whether in the form of an entry in a book or otherwise." Thus, informal memoranda, prepared for the purpose of recording company acts, transactions, occurrences, or events, dictated as a regular company practice within a reasonable time afterwards, would be admissible as records made in the regular order of business. See Smith v. Bear (2 Cir.), 237 F. (2d) 79.

nicipal Light & Power Co. (2 Cir.), 151 F. (2d) 65, it was held that copies of certain letters were admissible under the predecessor statute (28 U.S.C.A. § 695). These copies, however, did not constitute hearsay. They were not admitted to prove the truth of the contents, but only to show that notice of certain action had been given. In Waters v. Kings County Trust Co. (2 Cir.), 144 F. (2d) 680, cert. denied, 323 U.S. 769, the question was whether the administration of a trust is a "business," within the meaning of the business records act. It was not questioned that the writings, consisting of a bank's history sheet or diary of events, were otherwise admissible under the act.

Landay v. United States (6 Cir.), 108 F. (2d) 698, 704, cert. denied, 309 U.S. 681, concerned the admissibility of corporate books to prove certain stock transactions between corporations. They were identified by the one who superintended the making of the records, and the entries were, the court said, "prepared in the ordinary routine, which warrants their reliability." In Stillman v. United States (9 Cir.), 177 F. (2d) 607, it was held only that a proper foundation had been laid for the introduction of certain business records, where a partner had admitted that they were "the books" of the partnership.

United States v. General Motors Corporation (7 Cir.), 121 F. (2d) 376, 409, cert. denied, 314 U.S. 618, comes the closest to supporting appellee's position. It is stated in that opinion that intracompany reports are admissible, under the predecessor business records act, "as recorded acts or transactions made in the regular course of business." The court went on to say however, that most of the errors assigned in connection with this class of evidence were

not argued, and that the appellants admitted that none of such evidence was prejudicial in and of itself, though its cumulative weight might influence the jury. The court expressly stated that the appellants "could not possibly have been prejudiced or injured" by the reception of such evidence, either in isolation or in its entirety.

In discussing the admissibility, under § 1732, of the exhibits introduced in the case before us, it has not been practical to deal individually with the hundreds of items which were offered and received. It has been our purpose, however, to outline the factors to be considered in ruling upon these or other like exhibits offered on a different record at a new trial.

In our view, there was an inadequate foundation for the admission, as business records, of most of these exhibits.

The objections which appellants voiced to the introduction, under § 1732, of the exhibits in question were sufficient to present all of the considerations which have been discussed above.

That the introduction of these exhibits was prejudicial to appellants is not denied. All of the 46 exhibits mentioned in the specifications of error were referred to, and many were quoted, in the argument to the jury made on behalf of appellee. A great many additional exhibits of this kind are referred to in appellee's brief as providing evidence of an unlawful agreement, combination, or conspiracy.

If none of these inadmissible exhibits had been received, the evidence would have been insufficient to support the jury finding that there was such an unlawful agreement, combination, or conspiracy. If we were able to say that this evidence would not be admissible on any record which could be made,

and is irreplaceable, we would be warranted in directing dismissal of the action.

On a new trial, however, a proper foundation may be supplied for the admission of some of these documents, and other admissible evidence may be found in substitution of evidence here found to be inadmissible.[36] The attainment of substantial justice therefore requires that the action be not dismissed, but that it be remanded for a new trial. See 28 U.S.C.A., § 2106; Rule 61, Federal Rules of Civil Procedure, 28 U.S.C.A.

Admissibility as Extrajudicial Admissions of a Party-Opponent. Appellee, however, argues that, if these exhibits were inadmissible under § 1732, they were, in any event, properly received as extrajudicial admissions of a party-opponent (herein referred to as admissions). To this contention, appellants reply that (1) the course of the trial precludes sustaining the introduction of the documents as admissions; and (2) there was no foundation for introduction of the documents as admissions.

Turning to the first of these points, it is appellants' position that the challenged exhibits were offered and received only on the ground that they were business records admissible under § 1732. The possible admissibility of these exhibits as admissions having assertedly not been raised and inquired into at the trial, they should not now, appellants argue, be held admissible on the latter ground.

Examination of the record indicates that appel-

[36] Some of these exhibits which were admitted to establish the truth of the recitals therein contained (and so were hearsay) may also be admissible on a new trial for limited and nonhearsay purposes, such as to show the orders of a superior, pattern of business conduct, contemporary explanations of ambiguous conduct, notice, or motive. In this event, it would not be necessary to qualify them as business records, extrajudicial admissions, or under any other exception to the hearsay rule.

lants are correct in stating that these exhibits were admitted as business records, and not as admissions. Counsel for Moore, on two or three occasions, sought to admit documents of this kind as admissions. Each time, the trial court rejected this contention, and made it clear that the writings were receivable, if at all, only as records made in the regular course of business. Conforming to this ruling, the foundation evidence was directed only to the requirements of § 1732 as a ground for admission.[37]

All of the discussion and argument of counsel concerning the admissibility of individual exhibits, with the possible exception noted in the last footnote, were directed to that inquiry. Likewise, the comments of the court regarding the ground of admissibility concerned only that line of inquiry. As a result, the challenged exhibits were received only on the basis that they constituted memoranda or records made in the regular course of business.

In view of what has been said, it would be manifestly unfair for us to now hold these exhibits admissible on a different ground, assuming that the evidence in the record would support such a ruling. Appellants have had no trial court opportunity to inquire into the factual basis for admission of the exhibits on any ground other than that they were business records.[38]

Upon a new trial of this action, Moore may seek

[37] There is one possible exception to what has just been said. This concerns Plaintiff's Exhibits 28-A, 28-C, 29-E, and 32-A. The witness who gave the additional testimony concerning these exhibits testified that they had been prepared in Associated's San Francisco office, and that he had no knowledge of the procedure followed. Conceding that, as to these exhibits, a foundation for their admission as business records had not been established, counsel for appellee reoffered them only as against Associated, and on the theory that they were admissions. We have failed to find, in this voluminous record, where this reoffer of these exhibits was acted upon.

[38] See Shepard v. United States, 290 U. S. 96, 103; 1 Wigmore, Evidence (3d ed. 1940), 320, note 14.

introduction of some or all of these documents as admissions. We therefore consider it appropriate to state the principles to be applied in the event this effort is made. We speak here not of the foundation which must be laid to establish the authenticity and genuineness of such writings.[39] Our purpose is to indicate what showing Moore must make to warrant a determination that a properly authenticated document may be received, as an admission, to prove the truth of the statements therein made.

Extrajudicial admissions of a part-opponent are receivable as exceptions to the hearsay rule.[40] In our case, the documents consist of the writing of employees and agents of the companies against which, at a new trial, they would be produced. To obtain their reception as admissions, it must therefore be made to appear that the statements in question were made or acted upon under circumstances which require appellant corporations to accept responsibility for them as admissions.

The writings here in question were, for the most part, prepared and transmitted by employees and agents of the appellant company in whose files the documents were found. However, they were not, with a few exceptions, communications to persons outside such company. They were interoffice memoranda, letters, telegrams, reports, and the like. It follows that there is here no room for application of the rule [41] that the statement is the principal's if the agent or employee was authorized to make it

[39] Where a document is not admissible as a memorandum or record made in the regular course of business, its authenticity and genuineness must be established in accordance with familiar rules pertaining to the authentication of private writings in general. See the cases cited in 32 C.J.S., Evidence, pages 606 et seq., § 706.

[40] For a discussion of the distinction between extrajudicial admissions and statements of fact against interest, see 4 Wigmore, Evidence (3d ed. 1940) 6, § 1049; McCormick, Evidence (1954) 502, § 239, 546, § 253.

[41] Restatement, Agency, § 286.

to a third person. A report made by an employee or agent to his principal, and not to a third person, is not, as such, the principal's statement or extrajudicial admission.[42]

If, however, a corporation, through its shareholders, board of directors, or authorized management officials, vouches for part or all of an employee's or agent's statement, then the part vouched for is receivable against the corporation as an adoptive admission. It is not necessary, in such case, to show that the statement was expressly vouched for. If authorized management officials direct that business be conducted in reliance upon a particular intramural statement or report, and it is so conducted without reservation, the company has, by implication, adopted the statement or report, and is chargeable with it as an extrajudicial admission.

VI

CAUTIONARY INSTRUCTIONS CONCERNING ACTS OR EXTRAJUDICIAL DECLARATIONS OF COCONSPIRATORS

As stated in a preceding section of this opinion, evidence concerning the acts and extrajudicial declarations of one member of an asserted agreement, combination, or conspiracy are not to be considered as against other alleged members unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy.

When evidence of this kind is received, a cautionary instruction should be given to the jury, to be repeated at the end of the trial, calling attention to the limited effect to be given to such evidence.

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[42] Lever Bros. Co. v. Atlas Assurance Co. (7 Cir.), 131 F. (2d) 770; Restatement, Agency, § 287; Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 559; Morgan, The Rationale of Vicarious Admission, 42 Harv. L. Rev. 461, et seq.; Mechem, Agency (2d ed. 1914) § 1784.

Appellants complain of the cautionary instruction here given, asserting that the jury was not clearly told that, in order to impose liability upon any individual appellant, Moore had to connect that appellant with the alleged agreement, combination, or conspiracy, by evidence apart from the acts and declarations of any other appellant. Instead, according to appellants, the court permitted the jury to determine the complicity of one appellant from evidence of the acts and declarations of others.

Appellee argues that appellants are giving the trial court's cautionary instructions a strained construction, and that appellants did not, during the trial, point to the asserted defect they now rely upon.

Since the case must now be returned for a new trial, it is sufficient for us to say that the cautionary instruction dealing with this matter should clearly indicate that evidence of the acts and extrajudicial declarations of the agents and employees of one appellant is not to be considered in determining whether another appellant entered into the asserted agreement, combination, or conspiracy. However, if the jury finds, from substantial evidence independent of the acts and extrajudicial declarations of the agents and employees of other appellants, that a particular appellant entered into such an arrangement, then the evidence of such acts and declarations may be considered on the question of whether an overt act was committed pursuant to, or in furtherance of, the agreement, combination, or conspiracy.[43]

[43] See Mayola v. United States (9 Cir.), 71 F. (2d) 65, 67; Oras v. United States (9 Cir.), 67 F. (2d) 463, 466. See, also, the general discussion of the order of proof and the so-called "rule of convenience," in Flintkote Company v. Lysfjord, supra.

VII

ADMISSIBILITY OF EVIDENCE RELATING TO DAMAGES

Appellants question, in several particulars, the admissibility of certain evidence adduced by Moore on the question of damages. Since these questions may again arise on a new trial of this action, we here state our views.

The Hypothetical Question as to Good Will Value. It was Moore's contention that his business had been totally destroyed on August 15, 1952, when he could no longer obtain gasoline. He therefore asked the jury to measure his damages by the market value of the business on that date. Moore owned the land and the other capital assets of the business, and retained them when he went out of business. It follows that the only value which his business had before it was closed that it did not have afterwards was its "going concern" or "good will" value.

As one means of proving going concern or good will value, Moore produced the opinion testimony of an expert witness. The hypothetical question asked of this witness included, as one of its assumptions, that in August, 1952, Moore was forty-one years of age, was in reasonably good health, and wanted to continue the management of the service station. Appellants argue that the question, as so framed, was irrelevant to the issue.

We agree. In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the fu-

ture, considering all circumstances existing and known as of the date of the valuation? See Kimball Laundry Co. v. United States, 338 U. S. 1, 16-17. These are the factors which would influence a prospective purchaser. The special value which the business might have to Moore, or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on market value of the business.[44] Upon the retrial, the question should be framed to omit this irrelevant factor.

Appellants also contend that the hypothetical question, as asked, omitted the recital of many fundamental facts which were in evidence, and assumed basic facts contrary to the uncontradicted record.

We have no way of knowing what evidence will be in the record upon a retrial, on the basis of which a new hypothetical question may be asked. It will therefore serve no useful purpose to express an opinion as to whether the hypothetical question now before us, measured by the evidence in this record, is subject to the criticism leveled at it by appellants.

In general, it may be said that a hypothetical question should include any undisputed fact which is clearly material and important.[45] The parties, however, are often not in agreement as to what facts are undisputed, material, and important. If it is objected that certain facts should be included, it is for the trial judge, in the exercise of his discretion, to determine whether the question should be

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[44] Moore retains his life expectancy and business acumen. Assuming that he is entitled to, and so receives, the market value of the destroyed good will of his business, he can, at least theoretically, do as well with it as he could have done by continuing in business at his Fourth Avenue South location.

[45] Berndt v. Dept. of Labor & Industries, 44 Wn. (2d) 138, 148, 265 P. (2d) 1037, 1043; Starr v. Oriole Cafeterias, 182 Md. 214, 34 A. (2d) 335. Conversely, such a question need not include every fact in the case. Rowe v. Pennsylvania Greyhound Lines (2 Cir.), 231 F. (2d) 922, 925, cert. denied, 351 U. S. 984.

reframed to add such facts. Pasadena Research Laboratories v. United States (9 Cir.), 169 F. (2d) 375, 384, cert. denied, 335 U. S. 853.

If the trial judge does not require this to be done, it is seldom that prejudicial error can be said to result. This is because the objecting party can, through cross-examination, expose to the jury the asserted deficiencies of the hypothetical question as asked. Dunagan v. Appalachian Power Co. (4 Cir.), 33 F. (2d) 876, cert. denied, 280 U. S. 606. It is for this reason that it is usually held that defects in such a question go not to the competency of the evidence, but merely affect its weight. Permanente Metals Corp. v. Pista (9 Cir.), 154 F. (2d) 568, 569.

A hypothetical question calling for expert opinion must be based upon facts in evidence. Hupp Motor Car Corp. v. Wadsworth (6 Cir.), 113 F. (2d) 827. There is here less leeway for the exercise of discretion, since the determination of whether certain facts are in evidence is not so dependent upon judgment factors as the determination of whether certain facts are undisputed, material, and important. Even where it is found that facts assumed in the hypothetical question are not in evidence, however, it is not often that prejudice results. This, again, is because the exercise of the right of cross-examination makes it possible to illuminate any false assumptions contained in the hypothetical question.[46]

Qualifications of Expert Witness. The witness from whom Moore's counsel sought an expert opinion as to value of the business was Dr. Henry Burd.

[46] It should not be understood, from the foregoing discussion, that it is always necessary to propound a hypothetical question in eliciting the opinion of an expert. The present trend of thinking is that the use of hypothetical questions is not required except in the discretion of the trial judge. See Uniform Rules of Evidence, Rule 58; Uniform Act on Expert Testimony, § 9; McCormick on Evidence (1954) 34, § 16.

Dr. Burd taught marketing at the University of Washington from 1924 to 1954. Since then, and until the trial, he was engaged in business as a consultant in marketing fields. Appellants concede that Dr. Burd was eminently qualified in many phases of marketing, but argue that he was not qualified by study, training, or experience to state an opinion on the salable value of Moore's service station.

In determining whether a particular witness is qualified to express an expert opinion, the trial court is called upon to exercise a sound discretion. Pollard v. Hawfield (D.C. Cir.), 170 F. (2d) 170, cert. denied, 336 U. S. 909. Whether the witness has had occupational experience in the particular field embraced by the hypothetical question is a factor to be considered in determining his qualifications. But it is not controlling. The court may find that it is sufficient that such witness is qualified by study, research, and general background, to express an opinion. Empire Oil & Refining Co. v. Hoyt (6 Cir.), 112 F. (2d) 356; 2 Wigmore, Evidence (3d ed. 1940) § 556.

Our examination of the record convinces us that the trial court did not abuse its discretion in permitting Dr. Burd to express an expert opinion as to the value of Moore's gasoline service station business.

Formula Used to Measure Going-Concern Value. In expressing an opinion as to the going-concern value of Moore's business, Dr. Burd used a formula which allocated average profit to (1) capital investment, (2) values of personal services, and (3) "good will," and which capitalized the latter derived figure at various postulated percentages.

Appellants state that nowhere did Dr. Burd explain why the formula which he used was reasonable under the circumstances. Thus, it is contended,

his testimony is subject to the same objection which was upheld in Emich Motors Corp. v. General Motors Corp. (7 Cir.), 181 F. (2d) 70, 83, modified on another ground, 340 U. S. 558.

Without undertaking to say that the lack of background testimony explaining the formula used by Dr. Burd was a fatal defect, we express the view that it would have been better practice to have such an explanation from the witness. The outline of Dr. Burd's formula seemed to follow rather closely the prime factors mentioned in Kimball Laundry Co. v. United States, supra. But the jury should have had his reasons for adopting the particular formula and its component factors and assumptions. This deficiency can be supplied upon the retrial.

Opinion Based upon Developments Subsequent to Valuation Date. The measure of damages which Moore sought to establish was the market value of Moore's good will as of August 15, 1952. In testifying as to such market value, however, Moore and Dr. Burd were permitted to base their respective opinions in part upon certain events, facts, and business developments occurring subsequent to that date. Appellants contend that this should not have been permitted.

We agree. See Ithaca Trust Co. v. United States, 279 U. S. 151; New York v. Sage, 239 U. S. 57.

Opinion Testimony Based on Facts Not in Evidence. We have discussed above the contention that the hypothetical question asked of Dr. Burd was defective, in that it assumed facts not in evidence. Appellants also argue, quite from the asserted improp form of the hypothetical question, that Dr. Burd should not have been permitted to premise his answer upon facts which were not in evidence, and many of which were based on hearsay.

Dr. Burd testified that, in preparing himself to express an opinion as to market value, he made certain studies and gathered background information from a number of sources. He indicated the nature of these studies and the sources drawn upon.[47] The information gained or findings arrived at in the course of this research were not revealed, however, nor were the source materials which Dr. Burd consulted offered in evidence. On at least one occasion, counsel for Moore sought to have Dr. Burd testify as to the information gained in these pretrial studies. Appellants' objection was sustained, the court instructing the witness: "You can state if you considered things as a reason for this, but you cannot say what the things are as a factual basis."

It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, in so far as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the opinion may be

[47] (1) History of Moore's station from 1940 to July, 1952, the information being supplied by Moore; (2) retail gasoline business in Seattle as disclosed in published data for the nation as a whole; (3) general economic and business conditions, as reported in materials available in public library; (4) general business conditions from July, 1952, to 1955, based on Dr. Burd's personal study; (5) flow of traffic on Fourth Avenue South, shown by Seattle traffic surveys; (6) business performance of other gasoline stations in area since Moore went out of business, shown by Dr. Burd's personal observations; (7) data concerning gasoline stations in Seattle, taken from United States Census of Business; (8) gasoline prices from 1952 to 1955, revealed by Dr. Burd's research; (9) competitive conditions in the area of Moore's station from 1952 to 1955, as determined by investigations made by Dr. Burd; (10) service station operating problems learned by Dr. Burd as a result of discussions with a representative of Time Oil Company, and with a Richfield and a Standard dealer; and (11) business conditions in the Fourth Avenue South area, known to Dr. Burd because of his familiarity with the area.

expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed.[48]

Admissibility of Income Tax Returns. Copies of Moore's original income tax returns covering the period 1940 to 1952 were admitted in evidence over appellants' objections.

These tax returns, being offered in proof of the facts therein recited, were concededly hearsay. They were not admissible as admissions, because they were offered by the party for whom they were prepared. Nor does the fact that these returns were "public records" under the internal revenue laws render them admissible. Greenbaum v. United States (9 Cir.), 80 F. (2d) 113. They are not "business records," within the meaning of 28 U.S.C.A. § 1732, since not made in furtherance of Moore's business, but at the behest of the Director of Internal Revenue, under sanction of a federal statute. Matthews v. United States (5 Cir.), 217 F. (2d) 409, 413-414.

Moore, however, asserts that they were admissible as summaries of the details of his loose-leaf ledger which was admitted in evidence as Plaintiff's Exhibit 207.

Summaries of voluminous records may, in the descretion of the trial judge, be received in evidence. Board of County Commissioners v. William J. Howard, Inc. (10 Cir.), 230 F. (2d) 561, 564, cert. denied, 351 U. S. 926. No case has been cited, how-

[48] See District of Columbia Redevelopment Land Agency v. 61 Parcels of Land (D.C. Cir.), 235 F. (2d) 864; Gwathmey v. United States (5 Cir.), 215 F. (2d) 148; United States v. 5139.5 Acres of Land (4 Cir.), 200 F. (2d) 659. Some of the sources drawn upon by Dr. Burd, as summarized in the last footnote, are objectionable because they pertain to events occurring since the critical date of August 15, 1952. The witness should have been directed to exclude such considerations in arriving at his opinion.

ever, in which it has been held that income tax returns are admissible on such a theory. While the returns in question undoubtedly contain information drawn from Moore's ledger, they also contain computations which are not reflections of ledger entries. Moreover, the returns were actually offered as primary proof of the income from Moore's business. No testimony was offered, nor statement made, that these returns were being submitted as summaries of Moore's accounting records. In our view, the income tax returns should not have been received in evidence.

Admissibility of Ledger and Summary Sheets. Certain of the entries in Moore's ledger, introduced as Plaintiff's)Exhibit 207, were not made until several months after the transaction recorded. Mrs. Moore, who kept the ledger, was unable to recall the lapse of time involved in making certain other entries. The business records act provides that memoranda or records, to be admissible, must have been made at the time of the act, transaction, occurrence, or event recorded, or within a reasonable time thereafter. 28 U.S.C.A. § 1732. Appellants argue that, in view of this provision, portions of Plaintiff's Exhibit 207 which were not made shortly after the transactions recorded should have been excluded.

The entries were based upon cash register tapes, and, in most cases, were posted shortly after the end of each month. There were occasional time lags of several months in posting these entries. There was no evidence to show that this lag introduced inaccuracies or uncertainty as to the reliability of the ledger. The lapse of time was less than involved in United States v. Potson (7 Cir.), 171 F. (2d) 495, 499, where annual summary sheets were held to be admissible as business records. In our view, the trial

court did not err in admitting Plaintiff's Exhibit 207.

Certain summary sheets, admitted as separate exhibits, were based upon Moore's income tax returns. Since we have found such returns to be inadmissible, summaries based thereon should not be received at the new trial.

Appellants remaining specification of error relates to asserted prejudicial extraneous and coercive influences exerted upon the jury. The circumstances upon which this specification of error is based are not likely to recur at the new trial. It is therefore unnecessary to discuss the point in this opinion.

Reversed and remanded with directions to grant appellants a new trial.

(Endorsed:) Opinion. Filed Nov. 6, 1957.

Paul P. O'Brien, Clerk.

No. 14,319

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

GENERAL PETROLEUM CORPORATION, a Corporation; THE TEXAS COMPANY, a Corporation; and TIDE WATER ASSOCIATED OIL COMPANY, a Corporation,

Petitioners.

vs.

THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, HONORABLE JOHN C. BOWEN, *Judge*,

Respondent.

No. 14319
May 25, 1954.

ON PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

BEFORE: HEALY, POPE AND LEMON, *Circuit Judges*

POPE, *Circuit Judge.*

Petitioners seek writs of prohibition and of mandamus directed against the respondent District Court, prohibiting the enforcement of a certain order of that court dated March 17, 1954. The order under attack was entered in an action entitled "George F. Moore, plaintiff, v. Standard Oil Company of California, et al., defendants." It was made pursuant to that plaintiff's motion under Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides for the "Discovery and Production of Documents and Things for Inspection, Copying or

Photographing." As written the order requires each of the petitioners as a defendant in that action to make available to plaintiff's attorney for the purpose of inspection and copying, documents in their possession falling within 91 described categories and covering an eighteen year period extending to April 1, 1953.

We do not understand petitioners to object to the order as written, but the petition is based upon the contention that as construed and understood by the respondent court, and as petitioners are now called upon by the order not merely to make available to plaintiff's attorneys documents in their possession falling within the designated categories, but rather to supply and make available to plaintiff's attorneys their entire files and records so that such attorneys may examine and search through them for the required documents. Petitioners say that they must make such an interpretation of the order because of certain statements made by the court at the time the form of the written order was settled upon. At that time counsel for the defendants had presented to the court affidavits tending to show that in view of the number of years involved and the voluminous character of their files and records, it would require them as much as eighteen months to search for, procure and make available to plaintiff's attorneys the documents described in the listed categories. During the course of its colloquy with counsel upon this matter the court said: "It does not require the defendants to segregate anything from anything else. It requires the defendants to make the files of the company pertaining to this subject available, and at this time it is no concern of this plaintiff that the files might contain a letter he is not interested in. I do not see how it could possibly

take eighteen months to make available to plaintiff's attorneys and typists or photographers the files of the company that were accumulated in Seattle. * * * The only oral decision this court made or intended to make was that defendants make these files available to the plaintiff, to let plaintiff go and look at them and take copies of them. I do not recall making any order that required the assignment of an employee for six months or two years or a dozen employees for three days or any other length of time to make any copies or segregate any files. All the Court has intended to order is that defendants make these files relating to the subjects which are dealt with in these numbered items of the motion available to these persons acting for plaintiff and let them do the segregating and weeding out. * * * The Court is not requiring any defendant in this case to look for any group of letters and read each letter and determine whether or not the letter is pertinent to the case. The Court requires under the terms of this order which has been suggested by defendants that each and all of these defendants make available to plaintiff for inspection, photographing and copying within the times that are now to be stated in this order, and the burden is on the plaintiffs to do the segregating and getting the stuff that is material. * * * The Court does not intend to say by this order that any defendant must, for example, read two or more letters in order to find out which one of the letters is useful or relative to this case, but the defendants must understand this order is meant to make available to plaintiffs the files and records of the defendants which relate to the subject matter. * * *"

The court thereupon proceeded to fix May 3, 1954, as the date for production of the required

documents at Seattle, and July 1, 1954, as the date for production of those documents which were at petitioners' California offices.

In signing the order the court struck from it a provision to the effect that any party might apply upon good cause shown for an extension of time for the production of the documents. Thus petitioners contend that since the May 3, and July 1 dates did, according to their showings, afford insufficient time within which to separate and furnish the designated documents or categories of documents described in the order, and since the court by striking from the proposed order the provision for an application to extend the time indicated that compliance must be completed by those dates, the only meaning they could attach to the fixing of these dates, in the light of the court's remarks was that the order must be complied with by making available to plaintiff for the latter's examination, all of their files and records. This, they say, is the only way in which they could possibly comply with the order, and hence they were required to understand it so.

The position of the petitioners is that so construed the order is one in excess of the jurisdiction of the district court. This is so, they say, because Rule 34 authorizes production and inspection only of "designated documents".[1] As they say they are

[1] "Rule 34. Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

required to construe the court's order it is not so limited.

Petitioners also assert that the order thus construed calls for an unreasonable search and seizure of their papers in contravention of the Fourth Amendment to the Constitution, as the same is construed in Hale v. Henkel, 201 U.S. 43, 76, 26 S. Ct. 370, 50 L. Ed. 652.

Petitioners seek these writs for the seasons, as they say, that since the order in question is not appealable there is no other means by which they may seek redress or protection against the attempted invasion of their rights. They argue that they may not test the validity of the court's order by noncompliance, and an appeal from an order of contempt, since under the doctrine of United States v. United Mine Workers, 330 U.S. 258, 293a, 67 S.Ct. 677, 91 L.Ed. 884, the invalidity of the court's order would furnish no defense. By the time the final judgment in the case below reached this court on appeal the legal damage they would suffer through such unauthorized disclosure of their books and records would be beyond remedy, and hence they say this is one of those extraordinary cases in which such a writ should be issued; that under the circumstances the issuance of the writ would be in aid of this court's appellate jurisdiction.

If the order of the district court were held to have the meaning which petitioners attach to it, we would be confronted with a nice question as to whether the issuance of such a writ is within our power or jurisdiction under the "All Writs Act", 28 U.S.C.A. § 1651 (a). We do not reach that question here and express no opinion upon it for the reason that we think that the order of the district court

here under attack must be construed to have no meaning beyond or apart from that which is set forth in the order as written, and that it requires of the petitioners the production of nothing other than those designated documents listed within the several categories to which the written order refers. Further, the quoted remarks of the court during the colloquy with counsel which attended the hearing at which the form of the written order was determined upon, should not be construed by us as modifying that which the order itself says, or as enlarging the obligations of the petitioners in respect to that order, or as going beyond the limitations expressed in Rule 34. We think the court's remarks to counsel are to be understood as no more than an effort, in an informal manner to indicate the court's belief that no greater time was required by the showing then made.

It is our view that the order of March 17, 1954, did not and does not require the petitioners to permit the plaintiff in that action to have access to or an inspection of the files and records of petitioners without restriction or designation, but that on the other hand, the right of inspection and copying granted by such order was limited to the documents and papers designated in the order as written.

We construe the action of the district court in striking from the submitted form of order the express provision for further applications to extend the time for compliance as having been done, as the court's return shows, because of the court's view that such a provision for an extension of time was unnecessary in the light of Rule 6(b) which ex-

pressly permits such an application for an extension of time in any such case.

The respondent Judge has here disclosed that he "would have considered, and in the future will consider, modification of said order upon good and sufficient cause therefor being shown". The situation is similar to that which was presented to this court in United States v. Fee, 174 F. 2d 1020, and for reasons similar to those which prompted our action in that case we hold that the petitioners' application should be, and is denied.

Appendix B

FORM 5064 5-40 5000
PRINTED IN U.S.A.

UNION OIL COMPANY OF CALIFORNIA

IN REPLY GIVE NO. 131-D

189 DATE 10/11 1942

TO [illegible]

AT [illegible]

SUBJECT Competitive Info
Associated Self-Serve

Mr. Chris Pierce, Associated dealer at 7120
East Imperial Hwy. told me today that Associated
has removed all posting discounts from their Self-Serve
dealers and the Associations selling to them under
they price their posted price to the regular retail level.
Bill Schabb, operator of Bill's Carhop at
12200 East Imperial Hwy. said the Atlantic Petroleum
had been approached by Two Associated Self-Serve
dealers to be supplied by them for their further supply
since Associated were going to take away their discount.
I told him Associated Self-Serve Station in
my field that I can check the one in South Park
for further information.

APPENDIX B

Following is a compilation of the identifying marks and authenticating testimony relating to the indicia of authenticity of Exhibit 6-B and a portion of the pre-trial proceedings and representations made to the trial court that formed the background to his trial rulings on objections. The testimony is limited, however, to that bearing directly upon the technical authentication of 6-B and does not purport to include all of the testimony describing respondents' business operations or respondents' requests and use of such information.

I.

WITNESSES

Mr. Martin, whose stamp is on Exhibit 6-B was, at the time it was prepared, Seattle District Sales Manager of Union (R. 3494) Mr. T. G. Wise, whose name appears on 6-B with a note "for your info," was Northwest Territory Manager at that time (R. 3494-95, R. 6223). Mr. Bode, who gave further authenticating testimony had been in the Sales Service Department in Seattle (R. 3989) for seven or eight years (R. 3990).

At the time of trial Mr. Martin was Northwest Territory Manager. He testified both as an adverse witness and as a witness for Union. No respondent ever asked him to explain or rebut any inference that might arise out of the numerous documents on which his name appeared.

II.

OTHER EXHIBITS ON FORM 405-A

A. Exhibits on Form 405-A offered by petitioner or respondent Union:

Ex. No.	Date	File No.	Subject
4-A	9/ 3/51		Fair Trade Agreement
4-C	8/17/51		Fair Trade Agreement
4-G	9/ 2/49		Gasoline Prices
4-J	9/ 1/49		Gasoline Prices
5-A	5/10/52	131 D	
6-A	11/18/49		Competitive Info.
6-F	7/19/51	131 D	Gasoline—Competitive
6-P	2/23/50	131 D	Photographs—Competitive Stations
6-T	6/17/49		Competitive Conditions
6-W	10/11/50		Price Information
11-A	5/13/48	131 D	Jard Petroleum Serv-Ur-Self
A-231 U		131 D	Competitive Price Conditions—Retail

B. Use of Similar Forms

Standard Oil Company offered many exhibits consisting of memoranda in almost identical form and with similar subject matter. The Standard form was designated "GO-144". It offered as business records at least eighteen exhibits in this form, including:

A 73 (SO), A 92 (SO), A 94 (SO), A 96 (SO), A 98 (SO), A 99 (SO), A 100 (SO), A 102 (SO), A 104 (SO), A 111 (SO), A 118 (SO), A 127 (SO), A 130 (SO), A 131 (SO), A 132 (SO), A 133 (SO), A 134 (SO), A 135 (SO).

III.

OTHER EXHIBITS BEARING FILE NO. 131 D

The following exhibits also bear File No. 131 D, the same number as was on Exhibit 6-B:

Ex. No.	Subject
Exhibit 6-I	A survey of cut prices, price signs and Surv-Ur-Self gasoline stations, headed "Competitive Conditions'
Exhibit 6-Q	Survey of Serv-Ur-Self Stations
Exhibit 7-C	Relating to "Gasoline Pricing Brackets"
Exhibit 11-D	Serv-Ur-Self service stations

IV.

AUTHENTICATING TESTIMONY AND EVIDENCE RELATING TO EX. 6-B

a. Relating to "Form 405-A"

Martin (R. 3724-26)

Q. That [Ex. 6-A] is on a memorandum, is it not, on a regular Union Oil Company memorandum form?

A. It is on a regular Union Oil memorandum form, yes.

Q. It is Form 405-A, is that not correct?

A. That is right.

Q. And that is a form regularly used in the business of the Union Oil Company, is it not?

A. It is a form that is used in the business of the Union Oil Company, yes.

Q. For the purpose of transmitting business

information back and forth between representatives or executives of the company?

A. It is used to transfer various types of information back and forth.

Q. But primarily information relating to some portion of the business of the Union Oil Company, is that not correct?

A. I don't know as it is primarily. It is used in our business and it is used for conducting information back and forth between the various departments, yes.

Q. Information about the business?

A. Various types of information.

THE COURT: Read the question. I ask the witness to answer that question.

A. It could be, yes.

Q. (By Mr. Burdell): Well, it is not used for transmitting any information other than business information, is it?

A. It could be. I couldn't say that it is ever used for any other purpose. It is used for business information—transmittal of the information of business.

Q. That is its purpose, is it not?

A. I would assume that to be so, yes.

Q. It is?

A. Yes.

Q. It is not intended for the purpose of transmitting personal information or anything of that sort?

A. Not as far as I know. It could be used so.

Q. The company doesn't permit it, does it?

A. I wouldn't say that they sanctioned it, no.

* * *

Mr. Martin (R. 3564)

Q. Is that [Ex. 4-A] on a Union Oil Company form?

A. It is on a Union Oil Company form, yes.

Q. Does it bear a form number?

A. Yes.

Q. And is that a form number that you are familiar with?

A. Yes.

Q. Is it a form number used by Union Oil Company in transmitting memoranda?

A. Mainly inter-office, yes.

Q. Mainly inter-office memoranda; and is it a form used in connection with the business matters of Union Oil Company?

A. I would say it would be used in the business matters of Union Oil Company.

Q. And it is a regularly used form in the business matters of Union Oil Company, is it not?

A. I would say it would be used in the business matters of the Union Oil Company.

Q. When I say "regularly" it is used whenever information has to be transmitted, and this type of form is appropriate for transmitting that information?

A. It could be transmitted on this type of form

* * *

Bode (R. 3943)

Q. That [Ex. 11-A] is on a regular Union Oil Company form, is it not?

A. Yes, sir.

Q. Form 405-A?

A. Yes, sir.

* * *

Bode (3896)

Q. And when anybody in the company gave instructions to perform a function of that nature, the function was generally and regularly performed, is that not correct?

A. Yes, sir.

Q. And when it was the type of a function that required a report on Form 405-A, it was the regular job of whoever performed the function to write a report on 405-A, is that not correct?

A. It was part of his assignment.

* * *

b. Subject Matter "Competitive Info."

Bode (R. 3905)

Q. (By Mr. Burdell): Mr. Bode, did I understand you to say that you didn't, the company did not make any surveys which were confined to self-service stations?

A. I didn't make any such statements. I don't believe. I stated that the Company made surveys of competitive service stations, and that well could have included a survey of self-service stations.

* * *

Martin (R. 3728)

Q. Now, it was part of the business of the Union Oil Company, was it not, Mr. Martin, from time to time, to have its salesmen investigate competitive dealer accounts for one purpose or another, is that not correct?

A. There were times when it was done, yes.

* * *

Martin (R. 3729)

A. As much as I can read, it is something about a dealer of a competitive company.

Q. All right; and that subject, I think you have already testified to, is one that is performed from time to time as a part of the business of the Union Oil Company of California?

A. Occasionally we do check for competitive information, yes.

Q. All right. Now, you do so as a part of the business of the company, do you not?

A. Well, I would assume that it would be part of the business of the company.

Q. They do it from time to time as they are directed to, or as the occasion requires; is that right?

A. Or as the individual might require it, in charge.

Q. That is the individual who is working for the company in charge of the man who makes the investigation?

A. That is right.

* * *

Martin R. 3505)

Q. Mr. Martin, just before the noon recess I asked you if from time to time during the period of time that you were manager, if you or your employees under your supervision made a practice of investigating or observing the wholesale prices charged by your competitors?

A. Occasionally we would check prices.

Q. That would be both wholesale and retail, would it not?

A. Both wholesale and retail, yes.

* * *

Martin (R. 3522)

Q. Now, Mr. Martin, when you were District Manager from time to time were you requested to make a survey of serve-yourself type stations?

A. I don't recall specifically that I was requested to make a survey of serve-yourself type stations, specifically that type.

Mr Chris Pierce, Representative Member of the
East Chugwater Rdg. told me today that Mr. ... has removed all parts of the Farm Bureau Co-op Service Station and has discontinued selling to them under the Co-op Petrol price to the regular retail level.
Bill Schaldt, operator of Bill's Co-op Oil at the East Chugwater Rdg. said the Chris Petroleum had been appointed by Farm Bureau Co-op Service Stations formerly supplied by them for their further supply since Mr. ... were going to take away their discount.
I took it that Farm Bureau Co-op Stations in my field that I can check the one in South Park for further information.

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U.S. MARSHAL

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1 1950

FROM ... TITLE ... AT ...

Q. Well, you were requested to make a breakdown of serve-yourself type stations?

A. I have made surveys of service stations, been requested to make surveys of service stations from time to time.

As I say, I don't recall being specifically ordered to survey serve-yourselfs.

* * *

Martin (R. 3525-26)

Q. (By Mr. Burdell): Does it relate to the business of the Union Oil Company?

A. No. It relates to a survey to be made.

Q. Your answer is "No, it doesn't relate to the business of the Union Oil Company—or does it—which?

A. It relates to a portion of the business of the Union Oil Company, yes.

Q. The problem of making surveys from time to time was a portion of the business or a part of the business of the Union Oil Company, is that correct?

A. Spasmodically, yes.

Q. Well, when you say "spasmodically" I will have to ask you this question, then:

From time to time when some occasion arose making a survey necessary, it was the business of the Union Oil Company to make such a survey, was it not?

A. Yes.

* * *

Martin R. (3741)

Q. At some time, while you were District Manager at Tacoma, is it not a fact that surveys concerning cut-rate price signs were made?

A. That is correct.

Q. Those surveys were made, were they not, pursuant to instructions from your superiors?

A. They would have been, yes; I feel sure.

* * *

Bode (R. 3976)

Q. And I simply want to ask you, did the company from time to time make surveys of cut-price postings?

A. Yes.

* * *

Bode (R. 3899)

A. We occasionally take surveys of competitive service stations, not necessarily just serve-yourself, but any or all competitive service stations; and there could be a survey taken of serve-yourself.

Q. And what do those surveys show?

A. Oh, they could show many different things; the name, the location, and somebody's estimate of the volume.

Q. The prices?

A. Could include prices.

Q. And the supplier?

A. Might include the supplier.

Q. All right. Has your company taken surveys to your knowledge—I am not talking about you personally doing it—but I am just asking you if you know someone in the company did it—has your company made surveys of the existence or non-existence of price signs?

A. Yes.

* * *

Bode (R. 3967)

Q. All of those letters, which I have just designated, refer to the same subject, do they not; namely self-service stations or a self-serv-

ice station in Tacoma, Washington?

A. Yes, sir.

Q. It was the business of the Union Oil Company of California, was it not to obtain information and to transmit information concerning that subject matter, at or about the time of the transmission of those letters?

A. Yes; in fact, it is a continuous project.

* * *

Bode (R. 3968)

Q. Each of the exhibits before you is a document which was prepared by a representative of the Union Oil Company of California, as a part of that particular business, namely, the investigation of a self-service station or self-service stations in Tacoma, Washington, at or about that time?

A. Of course, it wasn't particularly for that time or that place. It is a continuous program with us. We are always more or less interested in what our competition is doing and this is an indication of what they did in a particular case.

* * *

Martin (R. 3736)

Q. And that also relates to competitive information does it not?

A. It does.

Q. Which I think you stated is a part of the regular business of the Union Oil Company of California, is that not correct?

A. It is a part of the business to report competitive conditions, yes.

Q. And those reports are made from time to time, as the occasion arises, or as instructions are given by the responsible officers and offi-

cials and representatives of the company, is that not correct?

A. The occasion could arise, from time to time, yes.

* * *

c. Filing and Stamping

Martin (R. 3530)

Q. Do you have any files down at the Union Oil Company that are not maintained in connection with the business?

A. I know of none.

* * *

Bode (R. 3915)

Q. Now, when documents are sent through some sort of chain of command, or some sort of series of people for their notice and stamp, that is done as a part of the business of the company; is that not correct?

A. Just a part of our regular business, yes.

* * *

Martin (R. 3737)

Q. Well when you state "could have been," I will ask you if it does not bear—as a matter of fact, it bears your noted stamp, does it not?

A. Yes.

Q. And you noted it in the regular course of your duties?

A. I noted it in the course of my duties.

Q. Well, it was—you noted such documents from time to time as they were made, pursuant to instructions given to subordinates in the company, is that not correct?

A. I noted such documents from time to time.

Q. As they were made in connection with the making of competitive reports, is that not right?

A. Documents that had competitive information on, yes, I noted them from time to time.

Q. And you noted that document in connection with that function?

A. I don't know that I noted it personally. It could have been noted in my office.

Q. I understand.

A. I could have, and I could not have.

Q. It was noted, either by you or by someone working under your direction pursuant to that practice . . .

A. (interposing): That is . . .

Q. . . . of noting competitive reports?

A. That is correct.

* * *

Bode (R. 3913-14)

Q. (By Mr. Burdell): Now, those initials, based upon your experience in the company, those initials indicate to you that that particular document was transmitted through the Seattle office to all of those people, and that all of those people or someone in their office saw the document and stamped it, is that not correct?

A. That is right.

V

SPECIFIC AUTHENTICATION OF EX. 6-B

Against this background establishing use of a routine form, contents of a routine nature, routine circulation and stamping pursuant to company practice and filing in business files, 6-B was authenticated itself as follows:

(R. 3733-35)

Mr. Burdell: May I hand Mr. Martin plaintiff's exhibit 6-B?

(Whereupon, proposed exhibit was handed to the witness by the bailiff.)

Q. (By Mr. Burdell): Mr. Martin, Plaintiff's Exhibit 6-B is also a document on the regular memorandum form of the Union Oil Company of California, is it not?

A. That is right.

Q. It is the same form, Form 5-5A (sic)?

A. It is the same form, yes.

Q. And purports to have been prepared by the same salesman who was purported to have prepared plaintiff's Exhibit 6-F, is that not correct . . .

A. (Interposing): That is right.

Q. . . . the earlier document?

Plaintiff's Exhibit 6-B bears your stamp, does it not?

A. That is right.

Q. Showing that you received and noted that?

A. It shows it was noted in my office, yes.

Q. By someone working under your supervision —

A. (Interposing): That is right.

Q. and authority?

Now, will you state the date of plaintiff's Exhibit 6 —

The Court (Interposing): I believe I had better take the recess I spoke of at this time.

[Respondents did not advise the Court below of any of the foregoing testimony].

Q. (By Mr. Burdell): Mr. Martin, you have before you plaintiff's Exhibit 6-B for identification?

A. That is right.

Q. I will ask you if that document appears to

you to have been prepared in the regular course of business of the Union Oil Company of California?

A. It appears to have been prepared during the course of business of the Union Oil Company.

Q. And it was the regular course of business of the business of the Union Oil Company of California to prepare such estimates and such memorandums from time to time as the occasion required, was it not?

A. It was part of the business of the Union Oil Company to do so.

Q. And that particular one appears to have been prepared as a part of that business, does it not?

A. It appears to have been prepared as a part of the competitive information report part of our business.

Mr. Burdell: The plaintiff offers in evidence Plaintiff's Exhibit 6-B.

VI

PRE-TRIAL PROCEEDINGS

a. Meaning and Understanding of Order

The following colloquy and comments by the Court illustrate the intent and meaning of the order to produce and constitutes a small portion of the relevant evidence before the trial court:

"THE COURT: The Court is concerned as to whether or not the material asked for may be thought reasonably to be relevant and *will not only itself be admissible in evidence but* might lead to the discovery of some other evidence not specifically mentioned in the present description of the item.

"MR. WILLIAMS [Counsel for Associated]

"Your Honor, may I speak to that last point for just a moment as long as it has come up? * * * I want to make it clear that every one of them is being produced with the idea that the plaintiff will take that document and put it in evidence in support of some point, and we say that it is clear from the nature of the document itself that the point to which they will attempt to put it in is an irrelevant point, outside of the necessary issues of this case (R. 712-13, No. 14319)."

"THE COURT: * * * Now, I had approached this subject with the thought that it was business records that we were concerned with here. * * *

"MR. WILLIAMS: Well, of course, *within the scope of the group of items that I am now addressing myself to*[1], hardly any of them, in quantum at least, are business records at all. They are records of previous litigation of various kinds (R. 720, No. 14319.)"

The Court signed the form[2] of order prepared by respondent with some minor changes. Colloquy at the time of presentation and signing the order included the following:

"MR. BURDELL [Attorney for Petitioner] * * * I think this order should be redrafted to provide that the records accumulated and made by the Seattle office and used by the Seattle office in the course of the operation of the Seattle office should

---

[1] The Court therefore sustained the objections to these items—109, 110 and 115 (R. 886, No. 14319).

[2] Thus respondents limited production of Item 112—"Personal and confidential business file of the Branch Manager, Seattle office" (R. 188) to "material in the file which concerns the performance of the duty and authority of the Branch Manager, Seattle Office" (R.830, 886)—in accordance with petitioner's agreement that that was all the request was intended to mean. (R. 757-58, No. 14319).

be produced by these defendants whether they are stored in Portland or Seattle or Kent, * * * (R. 851, No. 14319)."

"THE COURT: * * * Perhaps it is not necessary to change this order—I mean the expression on that point—at this time, but I wish particularly, Mr. Graham, as well as other counsel, to know that *the Court understood during argument, and I think counsel did generally, that it was Seattle business records that were desired,* and the expression 'located at Seattle' was one way of referring to them, no matter where they are now.

"Without the express wording of the order to include the situation mentioned by Mr. Graham, I think the defendants would be well advised to treat the order as covering the items in the records everywhere made or used or kept in connection with the conduct of the Seattle business. * * * (R. 853, No. 14319)."

b. Pre-trial Affidavits

All of the respondents filed numerous affidavits resisting discovery. In none of these was it questioned that the documents constituted business records. Most of respondents asserted they had regular policy of destroying records not needed in the business. (Standard, R. 372-375, No. 14319; Texas, R. 411, No. 14319; General, R. 480, No. 14319). The tremendous volume and routine nature of reports dealing with competitors' pricing and marketing policies and salesmen's reports are shown by respondents' own affidavits. (Salesmen's reports: 300,000 and 15,000 under items 32 and 113, Standard, R. 379-80, 397, No. 14319; 20,000 documents to be reviewed and 10,000 submitted under Item 32, Union R. 480, No. 14319).

AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON, }
County of KING } ss

PATRICIA METZ, being first duly sworn upon oath, deposes and says:

That she is a citizen of the United States, over the age of twenty-one (21) years and not a party to the above entitled action. That on the ..... day of MAY, 1958, she served twenty-nine (29) copies of the foregoing Petition for Writ of Certiorari upon respondents by depositing the same in the United States Post Office at Seattle, Washington, with due postage prepaid (airmail where required), addressed to each of the attorneys of record for each of the respondents as hereinafter set forth:

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SUBSCRIBED and sworn to before me this ..... day of MAY, 1958.

Notary Public in and for the State of Washington, residing at Seattle.